Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DAVID L. SMITH, as assignee of the interest of original Plaintiff, C. H. FAULKENBERRY, JR.

- Petitioner

vs.

JOHN ELKINS; BENEFITS SYSTEMS, INC.; MICROBE MASTERS, INC.

- Defendants

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. SMITH, Petitioner
In Proper Person
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56pp

QUESTIONS PRESENTED FOR REVIEW

This case is concerned with a federal district court's jurisdiction and procedures with regard to revival of a federal money judgment to avoid the effects of a state's statute of limitations. This petition for writ of certiorari is to have the U.S. Supreme Court consider:

1) whether, before adoption of Fed. R. Civ. P. 81(b), the "relief [t]heretofore available by...*scire facias*" included revival of a money judgment to avoid the effect of a state's statute of limitations upon failure of the judgment debtor or other party who was chargeable with the judgment to show that it had been paid, satisfied or released; and,

2) whether, after adoption of Fed. R. Civ. P. 69(a), proceedings for revival of judgment to avoid the effect of a state's statute of limitations were a "procedure on execution", "proceedings supplementary to and in aid of a judgment" or "proceedings on and in aid of execution".

At issue is whether the procedures to be followed in federal district court to obtain the relief of revival are determined by reference to the directive of Federal Rule of Civil Procedure:

a) 81(b), i.e."by appropriate action or appropriate motion under the practice prescribed" in the federal rules of civil procedure; or,

b) 69(a), i.e. "in accordance with the practice and procedure of the state in which the district court is held".

If the directive of Fed. R. Civ. P. 69(a) is determinative of procedures secondary issues will be presented as to whether Louisiana procedure for revival requires filing of a suit separate from the suit in which the judgment was originally rendered to effect revival and whether Fed. R. Civ. P. 69(a) or 81(b) abridges or modifies a substantive right in violation of 28 U.S.C. § 2072(b).

PARTIES TO THE PROCEEDINGS

The names of the parties to the proceedings are contained in the caption of the case. The U.S. Court of Appeals for the Fifth Circuit granted leave for International Biochemicals Group, Inc., (IBG) as corporate successor to Microbe Masters, Inc., to file an Amicus Curiae brief.

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CITATIONS OF OPINIONS AND ORDERS

None of the opinions or orders entered in courts below have been published. The opinions are set out in the appendix.

BASIS FOR JURISDICTION

On November 27, 1995 the U.S. District Court, Middle District of Louisiana questioned its jurisdiction and refused to grant a motion for revival of a money judgment rendered January 3, 1986 by the U.S. District Court, Middle District of Louisiana against the original judgment debtors for reason of "manner presented". On December 20, 1996 the U.S. Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals granted petitioner leave to file a petition for rehearing but denied the petition on February 5, 1997. This petition for a writ of certiorari is filed within 90 days of February 5, 1997. U. S. Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1651:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> "(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

28 U.S.C. § 1962:

> "Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and

shall cease to be a lien in the same manner and time. This section does not apply to judgments entered in favor of the United States. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State."

28 U.S.C. § 2072:

"(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

"(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

"(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title."

Fed. R. Civ. P. 69(a):

"Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."

Fed. R. Civ. P. 81(b):

> "The writ of *scire facias* and mandamus are abolished. Relief heretofore available by mandamus or *scire facias* may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

Fed. R. Civ. P. 82:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28 U.S.C. §§ 1391-93."

La. R.S. 9:5502

> "A. The filing of a notice of reinscription of a judicial mortgage pursuant to the provisions of Civil Code Article 3334 continues the effect of the mortgage without the necessity of filing a judgment reviving the original judgment creating the mortgage.
>
> "B. The recorder shall cancel and erase from his records a judicial mortgage created by the filing of a judgment of a court of this state that has been reinscribed, upon the written request of any person to which is attached a certificate from the clerk of the court rendering the judgment that no suit has been filed for its revival within the time required by Article 3501 of the Civil Code or of a certified copy of a final judgment of the court rejecting the demands of the plaintiff in a suit to revive the judgment."

La. R.S. 13:4204:

> "All judgments rendered by United States courts of original jurisdiction in Louisiana, or those registered in accordance with 28 U.S.C. § 1963, when recorded in the mortgage records of

any parish shall rank as judicial mortgages against all of the immovable property of the judgment debtor situated in the parish to the same extent and effect given by Louisiana law to the recorded judgments of the courts of this state."

La. C.C. Art. 3501:

"A money judgment rendered by a trial court of this state is prescribed by the lapse of ten years from its signing if no appeal has been taken, or, if an appeal has been taken, it is prescribed by the lapse of ten years from the time the judgment becomes final.

"An action to enforce a money judgment rendered by a court of another state or a possession of the United States, or of a foreign country, is barred by the lapse of ten years from its rendition; but such a judgment is not enforceable in this state if it is prescribed, barred by the statute of limitations, or is otherwise unenforceable under the laws of the jurisdiction in which it was rendered.

"Any party having an interest in a money judgment may have it revived before it prescribes, as provided in Article 2031 of the Code of Civil Procedure. A judgment so revived is subject to the prescription provided by the first paragraph of this Article. An interested party may have a money judgment rendered by a court of this state revived as often as he may desire."

La. C.C.P. Art. 2031:

"A money judgment may be revived at any time before it prescribes by an interested party in an ordinary proceeding brought in the court in which the judgment was rendered.

"The judgment debtor shall be made a defendant in the proceeding to revive the judgment, unless he is dead, in which event his legal representative or legal successor shall be made a defendant.

"A judgment shall be rendered in such a proceeding reviving the original judgment, unless the defendant shows good cause why it should not be revived."

STATEMENT OF FACTS

On January 2, 1986 a consent judgment in the amount of $30,000.00 and legal interest in favor of original plaintiff C. H. Faulkenberry, Jr. and against defendants John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc. was executed by counsels for plaintiff and all defendants, filed with the Clerk of Court and on January 3, 1986 approved by the Honorable Frank J. Polozola, Judge, U.S. District Court, Middle District of Louisiana and entered in the record of Civil Action 85-146 U.S. District Court, Middle District of Louisiana on January 3, 1986.[12a and 1-1 Lodgings]

Original plaintiff C. H. Faulkenberry, Jr. died July 5, 1992. By Judgment of Possession rendered September 8, 1992, in Probate No. 31230A, Seventh Judicial District Court, State of Louisiana, Parish of Concordia, Fern Lea Arnold Faulkenberry was recognized and decreed to be sole Universal Legatee of the entire estate of the decedent Claude Hiram Faulkenberry, Jr., and as such the owner, and she was sent into possession, without benefit of inventory of all the property of the succession of the decedent Claude Hiram Faulkenberry, Jr.

On October 26, 1993 by an act of assignment from Fern Lea Faulkenberry, widow and sole heir of original plaintiff C. H. Faulkenberry, Jr., petitioner, David L. Smith, acquired the interest of C. H. Faulkenberry, Jr. in the judgment entered January 3, 1986 in Civil Action 85-146 U.S. District Court, Middle District of Louisiana.

STATEMENT OF PROCEDURAL HISTORY

On November 21, 1995 petitioner, as assignee of the interest of C. H. Faulkenberry, Jr. in the judgment entered January 3, 1986 in

Civil Action 85-146, U.S. District Court, Middle District of Louisiana, entered a motion Pro Se to be substituted as plaintiff in Civil Action 85-146 for the purpose of revival of judgment. Incorporated into petitioner's motion was a certified copy of an act of assignment of the original plaintiff's interest in the January 3, 1986 judgment.

On November 21, 1995, predicated upon the motion for substitution being granted petitioner also entered, as substituted plaintiff and pursuant to Fed. R. Civ. P. 81(b), a motion Pro Se for revival of the unsatisfied judgment which would have otherwise become barred, on January 4, 1996, by lapse of a ten year prescription period established by Louisiana Civil Code Article 3501 (La. C.C. Art. 3501). Incorporated into petitioner's motion were a certified copy of the January 3, 1986 judgment, the statutory will of Claude Hiram Faulkenberry, Jr., the judgment of Possession from the SUCCESSION OF CLAUDE HIRAM FAULKENBERRY, JR., Probate No. 31230A, 7th Judicial District Court for the State of Louisiana, Parish of Concordia and an affidavit of David L. Smith that the judgment remained unsatisfied.

Pursuant to Fed. R. Civ. P. 5(b) petitioner's motions were served upon counsel of record for all defendants in Civil Action 85-146. The Court did not Order any other form of service. The defendants did not enter any pleading or response that the judgment had been paid, satisfied or released nor any other defense or appearance.

On November 27, 1995 in Civil Action 85-146 the Honorable Frank J. Polozola, Judge U.S. District Court, without response by any party and before ruling upon petitioner's motion to be substituted as plaintiff, by hand written Order entered on a draft of an ORDER for revival of the judgment which petitioner had submitted with petitioner's motion for revival, Ordered that the Court could not grant the motion for revival in the "manner presented" [7a]. The Court further Ordered that there was counsel of record for the plaintiff and questioned the district court's jurisdiction to grant the order in the "manner presented".

Also on November 27, 1995, but after questioning jurisdiction to grant revival of the January 3, 1986 judgment, the Honorable Frank J. Polozola, by hand written Order entered on a draft of an ORDER for substitution which petitioner had submitted with petitioner's motion for substitution, Ordered that the Court could not grant the Order for substitution "at this time for the reason previously stated" and the Court questioned "its jurisdiction to grant the relief requested" [9a].

The District Court Clerk's office failed to notice petitioner as to action of the District Court [7a and 9a].

On December 14, 1995 petitioner, having discovered the existence of a possible legal successor for judgment debtor Microbe Masters, Inc., prepared a Pro Se Motion for Substitution and Show Cause in Civil Action 85-146 seeking an Order that, International Biochemicals Group, Inc. a believed legal successor of judgment debtor Microbe Masters, Inc., be served and ordered to appear and Show Cause as to why it should not be substituted as defendant/ judgment debtor in place of original defendant/judgment debtor Microbe Masters, Inc. Having been informed of the District Court's denials of petitioner's earlier motions petitioner did not file the motion as drafted but modified the motion to further address the District Court's concern as to counsel of record for the original plaintiff by pleading that not only was the original plaintiff deceased but also the counsel for the original plaintiff and the original counsel's brother and only law partner were also deceased and the brothers' law partnership itself was extinct. Incorporated into petitioner's motion were certified copies of an act of assignment of the original plaintiff's interest in the January 3, 1986 judgment, affidavits of death of attorneys William P. Brumfield and H. Alva Brumfield filed in official records of their respective probates and a second affidavit of David L. Smith as to the judgment being unsatisfied. This affidavit also incorporated certified copies of documents of dissolution of Microbe Masters, Inc. into, and assumption of all liabilities by, its parent corporation and ultimate merger into, and assumption of all liabilities by, International Biochemicals Group, Inc. Pursuant to Fed. R. Civ. P. 5(b)

petitioner's motion was served upon counsel of record for all defendants, and noticed to original defendant John Elkins, and registered agents of original defendant Benefits Systems, Inc. and International Biochemicals Group, Inc. as successor to original defendant Microbe Masters, Inc. The Court did not Order any other form of service. The defendants did not enter any pleading or response that the judgment had been paid, satisfied or released nor any other defense that International Biochemicals Group, Inc. was not legal successor by force of law to original judgment debtor Microbe Masters, Inc. or why it should not be substituted as defendant/judgment debtor upon revival of judgment.

On December 18, 1995 the Honorable Frank J. Polozola, Judge U.S. District Court, by hand written Order on petitioner's draft of an ORDER, denied petitioner's motion, gave instructions to petitioner to file a separate action in the proper court having jurisdiction to enforce whatever rights petitioner had, and refused to "reopen the case" [11a].

On December 27, 1995 petitioner noticed appeal to the U.S. Court of Appeals for the Fifth Circuit as to the actions of the District Court on November 27, 1995 and on January 13, 1996 as to the action of the District Court on December 18, 1995.

On December 20, 1996 the U.S. Court of Appeals held, per curiam, that the district court had correctly questioned its jurisdiction to grant the order in the manner presented [3a] and affirmed the District Court for the reason that the district court could not look to

the original record to determine jurisdiction over petitioner or IBG.[1]

On February 5, 1997 the U.S. Court of Appeals for the Fifth Circuit granted petitioner's motion for leave to file a petition for rehearing and immediately denied petitioner's petition for rehearing [4a].

JURISDICTION IN THE FIRST INSTANCE

The U.S. Court of Appeals for the Fifth Circuit had jurisdiction under 28 U.S.C. § 1291. The U.S. District Court, Middle District of Louisiana had continuing jurisdiction under the provisions of 28 U.S.C. § 1331, 15 U.S.C. § 77V and 15 U.S.C. § 78aa.

REASONS FOR GRANTING THE WRIT

The writ is sought for the reason that the U.S. Court of Appeals for the Fifth Circuit's December 20, 1996 ruling is based on the premise that the jurisdiction of a federal district court to grant the relief of revival of a federal money judgment against the original judgment debtor to avoid the effect of a state's statute of limitation is dependent upon the claim for revival being asserted "in accordance with the practice and procedure" of the forum state, pursuant to Fed.

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[1] The U.S. Court of Appeals for the Fifth Circuit's decision incorrectly states that David Smith "...seeks revival of the January 1986 judgment against International Biochemicals Group (IBG), as corporate successor to Microbe Masters." [2a]. Petitioner's motion for revival was against original judgment debtors John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.

On December 14, 1995 petitioner did enter a motion for an Order that International Biochemicals Group, Inc.(IBG) be served and ordered to appear and show cause as to why IBG should not be substituted as defendant/ judgment debtor in place of original defendant/judgment debtor Microbe Masters, Inc. [see draft of Order 8a].

R. Civ. P. 69(a). By its decision and denial of rehearing the U.S. Court of Appeals for the Fifth Circuit has:

1) decided important federal jurisdiction questions that have not been, but should be, settled by the U.S. Supreme Court.

2) decided an important federal jurisdiction question in a way that conflicts with decisions of the U.S. Supreme Court, other U.S. Court of Appeals, and U.S. District Courts.

3) so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the U.S. Supreme Court's supervisory power.

The writ is also sought, in part, for the reason that should Fed. R. Civ. P. 69(a) be determinative of procedures in federal district court for revival of a federal money judgment:

4) the U.S. Court of Appeals for the Fifth Circuit has decided an important federal question in a way that conflicts with a decision by a state court of last resort.

5) either Fed. R. Civ. P. 69(a) or 81(b) abridges or modifies a substantive right.

REASON NO. 1 - FEDERAL DISTRICT COURT JURISDICTION

On December 20, 1996 the U.S. Court of Appeals for the Fifth Circuit held, per curiam, that, pursuant to Fed. R. Civ. P. 69(a), a federal district court may question its jurisdiction to grant revival of a federal money judgment to avoid the effect of a state's statute of limitations where the procedure utilized by a judgment creditor to assert the claim for revival does not conform to the state's procedural steps for revival as "Revival of a federal court judgment follows the

procedural law of the forum state". The Court of Appeals relied exclusively upon *Urban Resorts Group v. Wheeler*, No. 82-2470, 1996 WL 28507, 1 (E.D.La. 1/22/96) [14a or 1-3 Lodgings]. For its decision the District Court in *Urban Resorts Group* did not rely upon any published or unpublished decision. The District Court simply pronounced that:

> "The governing law relating to the revival of judgments derives from statutes pertaining to execution. The law pertaining to money judgments is found in Fed. R. Civ. Pro. 69(a)...". [14a]

The law of one thing simply does not "derive" from statutes pertaining to something else. There may not be a federal statute regarding revival of judgment but there is a federal rule regarding procedure for revival in federal district court. Fed. R. Civ. P. 81(b) explicitly provides that whatever relief had been available under the writ of *scire facias* prior to abolishment of the writ was still available in federal district court. Rule 81(b) is also explicit that the relief is available by motion where "appropriate". Fed. R. Civ. P. 81(b) only lacks specificity as to what are the conditions under which it is "appropriate" to seek the relief formerly available under the writ by motion or under what conditions it is "appropriate" to seek the relief by petition. But whatever the conditions, the jurisdiction of a federal district court to grant the relief previously available by the writ of *scire facias* is not dependent upon utilization of a forum state's procedure for that relief except as otherwise specifically provided in the rules. Further, a U.S. Court of Appeals - and the U.S. Supreme Court - are still permitted to issue the writ itself.

A federal district court's source for jurisdiction in proceedings for revival of a federal money judgments is "found", not in Fed. R. Civ. P. 69(a), but in 28 U.S.C. § 1651. Section 1651 is the source as the result of adoption of Fed. R. Civ. P. 81(b) in 1938 and consolidation of predecessor sections 342, 376 and 377 of 28 U.S.C in 1948. Prior to abolishment of the writ of *scire facias* by Rule 81(b) the relief of revival of judgment to avoid the effects of a state's statute of limitations was available in federal district court by writ of

scire facias.[2] The writ was also used when a new person had become interested in the judgment either as creditor or debtor and specifically in revival of judgment proceedings to give the debtor an opportunity to show that the judgment had been paid, satisfied or released, and if the debtor could not, to give the creditor a new right to enforcement from the date of the judgment of revival.[3]

When Rule 81(b) was adopted 28 U.S.C. § 377 contained the authority for federal district courts to issue all writs necessary or appropriate in aid of their jurisdiction. In 1948 28 U.S.C. § 377 was consolidated with other sections into 28 U.S.C. U.S.C. § 1651 but the jurisdiction of federal district courts to issue all writs necessary or appropriate in aid of their jurisdiction was preserved.[4] The jurisdiction of a federal district court after enactment of 28 U.S.C. § 1651 was the same as the jurisdiction before adoption of the Federal Rules of Civil Procedure.

The phrase "under the practice prescribed in these rules"

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2 *Western Surety Co. v. United States*, 100 F.2d 88, (9th Cir. 1938), *rehearing denied*; *Sun Indemnity Co. v. United States*, 91 F.2d 120 (3rd Cir. 1937); *Universal Transp. Co., Inc. v. National Surety Co.*, 252 F. 293 (S.D. N.Y.), *aff'd* 256 F. 450 (2nd Cir. 1919), 252 F. 293 (S.D. N.Y); *Evans v. Yost*, 255 F. 726 (8th Cir. 1919); *Tod v. Kuykendall*, 206 F. 482 (D. Colo. 1913); *Wonderly v. Lafayette County*, 77 F. 665 (W.D. Mo. 1896), *affirmed* in *Lafayette County v. Wonderly*, 92 F. 313 (8th Cir. 1899); *United States v. Payne*, 147 U.S. 687, 13 S.CT. 443, 37 L.Ed. 332 (1893)

3 *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631 (1949), 69 S.Ct. 762 (1949); *Insley v. United States*, 150 U.S. 512, 14 S.Ct. 158, 37 L.Ed. 1163 (1893); *McMullen v. Waters*, 295 F. 1008, 54 ADC 187 (1924); *Universal Transp. Co., Inc. v. National Surety Co.*, 252 F. 293 (S.D. N.Y.), *aff'd* 256 F. 450; *Wonderly v. Lafayette County*, 77 F. 665 (W.D. Mo. 1896), *affirmed* in *Lafayette County v. Wonderly*, 92 F. 313 (8th Cir. 1899); *McRoberts v. Lyon*, 79 Mich. 25, 44 N.W. 160; *Devereaux v. Brownsville*, 29 F. 742 (W.D. Tenn. 1887); *Grantland v. City of Memphis*, 12 F. 287 (W.D. Tenn. 1882)

4 28 U.S.C.A. § 1651, Historical and Statutory Notes p. 5

appearing in Rule 81(b) may be viewed as ambiguously making reference to Fed. R. Civ. P. 69(a) if not considered in conjunction with Fed. R. Civ. P. 82. Rule 82 provides that the Federal Rules of Civil Procedure are not to be construed to extend or limit jurisdiction of district courts. Consequently, after adoption of the Federal Rules of Civil Procedure the procedure, though it may be different, in federal district court cannot be construed to affect jurisdiction except as specifically provided. The Federal Rules of Civil Procedure replaced the Conformity Act[5] which Act essentially required federal courts to apply state laws and procedures where applicable. The Conformity Act did not require federal district courts to follow a forum state's "practice and procedure" for revival.[6] A writ of *scire facias* was not a writ of execution.[7] Consequently, unless there was some act by Congress contemporaneous with the adoption of the Federal Rules of Civil Procedure or enactment of 28 U.S.C. § 1651 causing the federal courts to adopt a forum state's "practice and procedure" for revival of judgment to avoid the effect of a state's statute of limitations the procedure in federal district court is not determined by reference to Fed. R. Civ. P. 69(a). Therefore, the language "under the practice prescribed in these rules" contained in Rule 81(b) is not a directive that a federal district court make reference to Fed. R. Civ. P. 69(a) but to the "practice prescribed in" other Federal Rules of Civil Procedure.

However, relying exclusively upon the decision in *Urban*

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5 *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941), *rehearing denied*, 312 U.S. 713, 85 L.Ed. 1144

6 *Devereaux v. Brownsville*, 29 F. 742, at p. 748 (W.D. Tenn. 1887), 129 U.S. 493, 9 S.Ct. 327 (1887)

7 "But this rule is not controlling in the issue and service of writs of scire facias because they are not writs of execution or other final process, nor are they proceedings thereon had..." *Collin County Nat. Bank v. Hughes*, 152 F. 414 (8th Cir. 1907), *rehearing*, 155 F. 389, at 392 (8th Cir. 1907); *see also Deneale v. Archer [Stump's Executors]*, 33 U.S.(8 Pet 528), 8 L.Ed. 1033 (1834)

Resorts Group the U.S. Court of Appeals for the Fifth Circuit has decided that, pursuant to Fed. R. Civ. P. 69(a), "Revival of a federal court judgment follows the procedural law of the forum state" [2a] and a federal district court is without jurisdiction to grant revival of its own money judgment where the procedure utilized by a judgment creditor to assert the claim for revival does not conform to a state's procedural steps for revival. The Court of Appeals has construed Fed. R. Civ. P. 69(a) as a "jurisdictional" rule abridging or limiting the jurisdiction of a federal district court. However, there is not any U.S. Supreme Court ruling that after adoption of the Federal Rules of Civil Procedure:

1) the governing law relating to the revival of judgment derives from statutes pertaining to execution; or,

2) Revival of a federal court judgment follows the procedural law of the forum state; or,

3) since adoption of Fed. R. Civ. P. 69(a)

a) proceedings for revival of judgment are a "procedure on execution", "proceedings supplementary to and in aid of a judgment" or "proceedings on and in aid of execution"; or,

b) a federal district court is without jurisdiction to grant the relief of revival of a money judgment to avoid the effects of a state's statute of limitations except "in accordance with the practice and procedure" of a forum state; or,

c) neither a federal district court nor a U.S. Court of Appeal have jurisdiction to grant revival of a federal money judgment to avoid the effects of a state's statue of limitations upon failure of the judgment debtor or other party who may be charged with the judgment to show that it had been paid, satisfied or released.

REASON NO. 2 - REVIVAL IS NOT A "LIEN EFFECT"

To revive a federal money judgment the U.S. Court of Appeals for the Fifth Circuit has decided that a judgment creditor must comply with La. C.C.P. Art. 2031 which the Court of Appeals perceives to be a Louisiana "practice or procedure" contemplated by Fed. R. Civ. P. 69(a). The Court of Appeals apparently arrived at its decision as the result of construing revival of a federal money judgment as synonymous with continuation of a "lien" of a federal judgment, which pursuant to 28 U.S.C. § 1962 continues in the same manner and time as the lien of a state judgment. 28 U.S.C. § 1962 was enacted contemporaneously with 28 U.S.C. § 1651 but Section 1962 does not specifically provide that revival of a judgment is an effect of a "lien" or that the procedure for revival of a judgment thereafter was "conformed to rules and requirements relating to judgments of the courts of" a forum state.

Further, in Louisiana a "lien" is not an effect of a judgment but an effect of seizure of property, i.e. an "execution" lien, or an effect of Louisiana's recordation laws, i.e. a "judicial mortgage". Pursuant to La. R.S. 13:4204 and 28 U.S.C. § 1962 a federal money judgment attains status as an "execution" lien by compliance with procedures for "execution" contained in La. C.C.P. Arts. 2251 through 2541. A federal money judgment attains status as a "judicial mortgage" by compliance with Louisiana's recordation law, La. C.C. Art. 3320 et seq.[8]

Louisiana's current recordation law provides that a judicial mortgage is given the effect of recordation in mortgage records, i.e. "recordation lien", upon a copy of a judgment, certified by the clerk of the court that rendered the judgment, being filed with the recorder

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[8] NOTE: Prior to January 1, 1993 judicial mortgages were created pursuant to provision of La. C.C. Art. 3369 repealed by Acts 1992, No. 113 § 1 eff. Jan 1. 1993.

of mortgages[9], that the effect of recordation ceases ten years after the date of the judgment[10], and that a person may reinscribe a recorded document creating a mortgage or evidencing a privilege by filing with a recorder a signed, written notice of reinscription[11]. As regards continuation of the effect of a judicial mortgage La. C.C. Art. 3334 provides that:

> "A notice of reinscription that is filed before the effect of recordation ceases continues that effect for ten years from the day the notice is filed."

and La. C.C. Art. 3335 provides that:

> "A notice of reinscription that is filed after the effect of recordation ceases produces the effects of recordation, but only from the day the notice is filed."

In Louisiana, contrary to the inference of *Urban Resorts Group* revival of a judgment does not continue a judicial mortgage, i.e. "recordation lien". Revision Comments - 1992 following La. C.C. Art. 3335 reads:

> "(b) This Article applies also to judicial mortgages. The failure to reinscribe a judicial mortgage within ten years of its date causes the effect of registry to cease. R.S. 9:5502, adopted with

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9 La. C.C. Art. 3321(2)

10 "The effect of recordation of a judgment creating a judicial mortgage ceases ten years after the date of the judgment." La. C.C. Art. 3330

11 "A person may reinscribe a recorded document creating a mortgage or evidencing a privilege by filing with a recorder a signed, written notice of reinscription. The notice shall state the name of the mortgagor or obligor of the privilege as it appears in the recorded document and recordation number or other appropriate recordation information of the document or of a prior notice of reinscription, and shall declare that the document is reinscribed." La. C.C. Art. 3333.

this revision clarifies a common misunderstanding as to the relationship between the recordation and reinscription of a judgment, and judgment of revival obtained pursuant to Article 3334 [sic].[12] A notice of reinscription continues the effect of registry of the judgment. A judgment prescribes if a suit to revive it is not filed within ten years of its date and a judgment reviving it obtained in due course. If the judgment is not reinscribed, the effect of registry ceases whether or not prescription is interrupted by a judgment of revival. If the judgment is reinscribed, the mortgage nevertheless becomes unenforceable if the judgment prescribes. R.S. 9:5502 codifies these principles by providing that the filing of a notice of reinscription pursuant to Article 3334 continues the effect of the mortgage without the necessity of filing a judgment reviving the original judgment." Revision Comments - 1992 following La. C.C. Art. 3335. (footnote added)

Even though the periods established by La. C.C. 3330 for duration of a judicial mortgage and the period established by La. C.C. Art. 3501 for prescription of a judgment are all ten years[13], the periods are not identic. And, the procedures to continue the effects of a recordation lien created before January 1, 1993[14] are not the procedures to continue the effects of a recordation lien created after December 31, 1992 and neither procedure is the procedure to avoid

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12 Correctly La. C.C. Art. 3501.

13 NOTE: For judicial mortgages created prior to January 1, 1993 the effects of recordation cease pursuant to the former La. C.C. Art. 3369 repealed by Acts 1992, No. 113 § 1 eff. Jan. 1, 1993

14 "E. The effect of registry ceases in all cases...unless the inscriptions have been renewed within the periods of time above provided in the manner in which they were first made, or by filing a notice or reinscription of mortgage or a written request for reinscription by the mortgagee or any interested person, together with a copy of the original act of mortgage. In all cases the reinscription of the mortgages and privileges shall preserve their effect for ten years from the date of the timely renewal as above provided." La. C.C. Art. 3369 repealed by Acts 1992, No. 113 § 1 eff. Jan.1, 1993

the effect of the end prescription period on the judgment.

La. C.C. Art. 3501 and La. C.C.P. Art. 2031 both permit revival of a judgment whether the judgment has attained status as a "lien" or not. The Court of Appeals apparently relied upon the *Urban Resorts Group* Court's determination that La. C.C. Art. 3501 is the "relevant" law for 28 U.S.C. § 1962, but neither court provides explanation as to how 28 U.S.C. § 1962 is relevant to revival of a judgment that has never attained status as a "lien".

A possible explanation as to why the *Urban Resorts Group* Court believed La. C.C. Art. 3501 to be "relevant" to 28 U.S.C. § 1962 is that, for whatever historical reason, enforcement of a judicial mortgage by "executory process" and enforcement of a judgment by causing seizure, i.e. "execution", are both commonly referred to as "execution" of the judgment. Apparently the *Urban Resorts Group* court construed revival of a federal money judgment as synonymous with continuation of a judicial mortgage created by recordation of a federal money judgment, which pursuant to 28 U.S.C. § 1962 continues in the same manner and time as a judicial mortgage created by recordation of a state court money judgment. This construction is not correct as explained above. Further, Louisiana's procedures for "execution", La. C.C.P. Art. 2251 through 2541, are contained in Book IV of the Louisiana Code, the procedures for "executory process", La. C.C.P. Art. 2591 et seq., are in Book V. The procedure for revival of a money judgment, La. C.C.P. Art. 2031, is a singular article under "Chapter 5. Revival" in Book II, "Ordinary Proceedings". Even the arrangement of the procedure article for revival of a money judgment is totally un-associated with the procedures for enforcement of a money judgment.

There are multiple rulings by the U.S. Supreme Court[15], U.S.

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15 *Huddleston v. Dwyer, Okl.*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944); *Custer v. McCutcheon*, 283 U.S. 514, 51 S. Ct. 530, 75 L.Ed. 1239 (1931); *Browne, Manzaneres & Co. v. Chavez*, 181 U.S. 68 (1900); 21 S.Ct. 514, 45 L.Ed. 752 (1901); *Deneale v. Archer [Stump's Executors]*, 33 U.S.(8 Pet. 528), 8 L.Ed. 1033 (1834)

Court of Appeals[16] and U.S. District Courts[17] that a proceeding for revival of judgment to avoid the effect of a state's statute of limitations is not "execution" of a judgment or a proceeding "on and in aid of execution" or a proceeding "supplementary to and in aid of a judgment" and that revival proceeding are ancillary to the suit in which the judgment was rendered. There are also many Louisiana court rulings to the same effect. However, except as *Missouri & Arkansas Lumber & Mining Co. v. Greenwood Dist. of Sebastian County, Ark.*[18] may be construed that revival is not a "lien effect" there are apparently no rulings that the right of revival is or is not a "lien effect" of a judgment. By this writ of certiorari petitioner seeks to have the U.S. Supreme Court consider whether the procedures for revival of a federal money judgment must be "conformed to rules and requirements relating to judgments of" a forum state, pursuant to 28 U.S.C. § 1962, because the right of revival is a "lien effect" of a judgment.

REASON NO. 3 - "APPROPRIATE ACTION OR MOTION"

Fed. R. Civ. P. 81(b), unamended since becoming effective in

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16 *U.S. v. Fiorella*, 869 F.2d 1425 (11th Cir. 1989); *Miller v. United States*, 160 F.2d 608 (9th Cir. 1947); *Armour & Co. v. Kloeb, District Judge*, 109 F.2d 72, 74 (6th Cir. 1939), *reversed on other grounds*, 1940, 61 S.Ct. 213, 311 U.S. 199, 85 L.Ed. 124; *Green v. Langnes*, 82 F.2d 926, 927 (9th Cir. 1936); *Collin Co. National Bank v. Hughes*, 152 F. 414 (8th Cir. 1907), rehearing 155 F. 389 (8th Cir. 1907); *Wonderly v. Lafayette County*, 77 F. 665 (D.Mo. 1896), *aff'd* in *Lafayette County, Mo. v. Wonderly*, 92 F. 313 (8th Cir. 1899); *Pullman's Palace-Car Co. v. Washburn*, 66 F. 790 (D. Mass 1895), 76 F. 1005 (1st Cir. 1896)

17 *United States v. Jenkins*, 141 F.Supp. 499 (S.D. Ga. 1956), *aff'd*, 238 F.2d 85 (5th Cir. 1956)(per curiam), *appeal dismissed*, 352 U.S. 1029, 77 S.Ct. 595, 1 L.Ed.2d 598 (1957); *United States v. Kendall*, 263 F. 126,(E.D. La. 1920); *Tod v. Kuykendall*, 206 F.482 (D. Colo. 1913); *King v. Davis*, 137 F. 222 (W.D. Va. 1905), *aff'd*, 157 F. 676 (4th Cir. 1906)

18 39 S.Ct. 202, 249 U.S. 170, 63 L.Ed. 538 (1919)

1938, expressly provides that relief previously available by *scire facias* may be obtained by appropriate action or by appropriate motion under the practice prescribed in the federal rules of civil procedure. Revival of a money judgment to avoid the effect of a statute of limitations was one of the forms of relief available under the writ of *scire facias*. Notes following Rule 81 do not provide clarification as to what are the conditions under which it is "appropriate" that a claim for revival of judgment might be asserted by motion and under what conditions it is "appropriate" to assert the claim by a petition. However, a review of drafts, committee notes and various comment summaries of the U.S. Judicial Conference: Committees on Rules of Practice and Procedure does.[19]

As early as February 11, 1936 Advisory Committee Chairman William D. Mitchell[20] had commented that 28 U.S.C. § 778 provided for the writ of *scire facias* but that he questioned the need to preserve the writ in federal district court rules for the reason that in code states "most lawyers do not know what that is".[21] By not later than February 1937 the Advisory Committee had decided to abolish the writ of *scire facias* but left the placement and phraseology

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19 *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, (Congressional Information Services, Inc. 1991)

20 The Advisory Committee on Rules for Civil Procedure appointed by the U.S. Supreme Court to assist the Court in preparation of a unified system of general District Court rules pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064. 295 U.S. 774

21 Compilation of rule drafts, comments, and analysis: files for individual rules 1/34-3/54, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, supra, CI-2611-40

to the Style Committee.[22] A typed draft, identified as "Style Com. April, 1937", of the rule which evolved into the current Rule 81(b) reads "(b) Scire Facias. The writ of scire facias is abolished."[23] A printed version intended for an April 1937 report to the Supreme Court reads the same.[24] On another printed version of the rule the words "The writ of *scire facias* is abolished." has been lined out and an unidentified scrivener's handwritten annotation "The writ of scire facias & mandamus are abolished but relief heretofore available may be allowed by appropriate ~~order in~~ action or [illegible]" has been added.[25] Minutes of a November 3, 1937 meeting of the Advisory Committee document that the language of the second sentence of Rule 81(b) was not formally adopted until long after the decision to

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22 Deskbook draft: preliminary draft, revised, William D. Mitchell's annotated copy 2/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-5413-30 [draft of Rule 90, now Rule 81, re: Applicability of the Rules] [contains typewritten margin annotation "NOTE:- Placement and phraseology of habeas corpus, mandamus and quo warranto proceedings left to Style Committee. Rules to state somewhere 'scire facias is abolished'".]

Compilation of rule drafts, comments, and analysis: files for individual rules 1/34-3/54, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and procedures, 1935-1988, *supra*, CI-2611-61 [draft of Rule 30, now Rule 25, re: Substitution of Parties] [contains typewritten margin annotation - "The Style Committee is to decide whether the statement that scire facias is abolished is to appear in this rule or in a note thereto or somewhere else."]

23 Deskbook draft: Style committee draft, annotated 4/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-5407-84

24 Deskbook draft: report to Supreme Court, rules 1-88, printed 4/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-905-28

25 Deskbook draft: report to Supreme Court, printed 4/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-6203-54

abolish the writ of *scire facias*.[26]

These drafts and comments do not suggest that the phrase "appropriate action or appropriate motion" was used to instruct federal district courts, that after reference to a forum state's "practice and procedure", they were to select the "appropriate" form utilized in state courts in the forum state and then accept or decline jurisdiction dependent upon how a claim for revival was asserted. The following four comments appear to be relevant as to the genesis of the language of the second sentence of Rule 81(b):

1) The Honorable Charles McHenry Howard, Baltimore, Md. (4th Cir.), 6/11/37:[27]

> "(b) In abolishing the writ of scire facias, wonders if Committee has not abolished a remedy without substituting anything in place thereof...Mr. Howard says:
>
> "Just where are you left if the writ of scire facias is abolished in this way? Possibly the answer is that the all-serving motion takes its place; that you still have the substance of the remedy of scire facias. But it becomes merely a motion under the earlier provisions of these rules...
>
> "My only doubt is whether by abolishing the writ of scire facias you leave a substitute for reviving the judgment that is about to be outlawed under the Federal law which says such matters are regulated by the state law where the Court sits, where the judgment was recovered.

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[26] Minutes: advisory committee on rules of civil procedure (11/3/37), *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures 1935-1988., *supra*, CI-221-60

[27] Comments summaries for draft of April 1937 (Edgar B. Tolman's copy) 4/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-4109-65

"Probably the answer is you do the same thing you would have done under scire facias, but you do it by motion that is served or summons issued. But, if so oughtn't that to be said, because if all you want to do is do away with the name of scire facias and leave a substitute for it, oughtn't there to be some mention of what that substitute is?" (emphasis added)

2) The District of Columbia Bar Association Report, 9/28/37:[28]

"(b) Says that abolition of writ of scire facias will absolutely prohibit enforcement of judgments after expiration of time limited by state statue even though state statute confers a right by scire facias or analogous procedure. Cites U.S.C., Title 28, § 727, and Metcalf v. Watertown, 153 U.S. 671 and Custer v. McCutcheon, 283 U.S. 514, which make state statutes of limitation on judgments applicable in federal courts.

"Questions the court's power to adopt the rule."(emphasis added)

3) The Joint Report of the Chicago and Illinois Bar Assn Committees, 9/24/37:[29]

"Subdivision (b), lines 85-86 - suggests substituting motion for former scire facias to revive judgments, as was done in Illinois and other states. Believes there is danger in abolishing the writ unless this is done." (emphasis added)

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28 Comments summaries for draft of April 1937 (Edgar B. Tolman's copy) 4/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-4109-67

29 Comments summaries for draft of April 1937 (Edgar B. Tolman's copy) 4/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-4109-67

4) (E.B.T - 10/18/37) 9.[30] [Edgar B. Tolman, Secretary, Advisory Committee on Rules for Civil Procedure]

> "(b) Scire Facias.
>
> "...In Illinois, a new suit on a judgment would not preserve the lien of the original judgment. It would merely create a new and junior lien as of the date of the new judgment. Moreover it might not be possible to get personal service on the original defendant."(emphasis added)

The chronology of the drafts, committee notes and various comment summaries is suggestive that the directive contained in the second sentence of Rule 81(b) was not a product of the abolishment of the writ of *scire facias* but a product of several commentators' concern that it was necessary to clarify that federal district courts were not to construe abolishment of the writ of *scire facias* in exactly the manner that the U.S. Court of Appeals for the Fifth Circuit, the U.S. District Court, Eastern District of Louisiana and presumptively the U.S. District Court, Middle District of Louisiana have done.[31]

Petitioner has located but a single ruling[32] that suggests, as does two Federal Rules Service reporter Commentaries with regard to Fed. R. Civ. P. 81(b)[33], that as used in Fed. R. Civ. P. 81(b), the phrase "appropriate action or appropriate motion" makes reference to

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30 Deskbook draft: Edgar B. Tolman's annotated copy 10/37, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, *supra*, CI-4809-56

31 *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946)

32 *Armour & Co. v. Kloeb, District Judge*, 109 F.2d 72 (6th Cir. 1939), *reversed on other grounds*, 1940, 61 S.Ct. 213, 311 U.S. 199, 85 L.Ed. 124

33 2 Fed. R. Serv. (Callaghan) 676 Commentary Rule 81b.22; 5 Fed. R. Serv. (Callaghan) 852 Commentary Rule 81b.12

the status of jurisdiction[34] over the parties against whom revival of judgment is sought. The comment of Advisory Committee Secretary Edgar B. Tolman as to the possibility of not being able to get personal service on the original defendant is by itself suggestive that it is not necessary to re-establish jurisdiction over the original defendants in a revival proceeding and that it is "appropriate" to assert a claim for revival against the original judgment debtors by motion. By its December 20, 1996 decision and denial of rehearing the U.S. Court of Appeals for the Fifth Circuit has rejected this suggestion.

The U.S. Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by one lower court, and maybe two, as to call for an exercise of the U.S. Supreme Court's supervisory power. It is necessary that the U.S. Supreme Court clarify or interpret the phrase "by appropriate action or appropriate motion under the practice prescribed" in Fed. R. Civ. P. 81(b) and the phrase "in accordance with the practice and procedure of the state in which the district court is held" in Fed. R. Civ. P. 69(a) in relation to jurisdiction of federal district courts over proceedings for revival of a federal money judgment as revival is contemplated by a state's statute of limitations.

REASON NO. 4 - LOUISIANA PRACTICE AND PROCEDURE

As a consequence of construing Fed. R. Civ. P. 69(a) as a "jurisdictional" rule the Court of Appeals has considered Louisiana's procedure for revival and determined that "Under Louisiana law [La. C.C.P. Art. 2031], a money judgment may be revived by an 'ordinary proceeding' brought in the court which rendered the original judgment". As a consequence of this determination the Court of Appeals has dismissed petitioner's claim for revival for the reason

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[34] For discussion of jurisdiction see *Noxon Chemical Products Co. v. Leckie*, 39 F. 2d 318 (3rd Cir. 1930), *writ denied*, 282 U.S. 841, 51 S.Ct. 22

that petitioner's claim for revival against the original judgment debtors was asserted by motion in the original suit in which the judgment was rendered and "Louisiana courts have held that revival of judgment under Article 2031 requires the filing of a suit in ordinary proceedings." The dismissal is incorrect for the reasons that even if Louisiana's procedure for revival were controlling in federal district court, neither La. C.C. Art. 3501 nor La. C.C.P. Art. 2031 require that a separate action be instituted. Further, the Louisiana Supreme Court has not held that La. C.C.P. Art. 2031 requires instituting a separate suit for revival and actual practice in Louisiana is that revival is effected against the original debtor by motion in the original suit.[35] And, a "'suit' is any proceeding in court of justice, whereby plaintiff pursues his remedy to enforce his demand".[36]

The U.S. Court of Appeals relied upon three Louisiana state appeal court decisions all of which cite *Cassiere v. Cuban Coffee Mills*, 74 So.2d 193 (La. 1954). The Louisiana Supreme Court's decision in *Cassiere v. Cuban Coffee Mills* was not that a separate suit was required for revival but that "...Article 3547 of the Code provides the only method by which the ten year prescription on a judgment may be prevented...".

Two of the three Louisiana state appeal court decisions upon which the Court of Appeals relied for its decision are actually decisions regarding enforcement of judicial mortgages. The third state appeal court case concerned a judgment debtor's action, after the judgment had prescribed, to have the judicial mortgage erased from official records. By reconventional demand the assignee of the judgment creditor sought revival pleading that absence of the judgment debtor from the state, preventing service of a suit for

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35 "This article [La. C.C.P. Art. 2031] provides the time during which a judgment creditor can file a petition or motion to keep the judgment alive for future execution or satisfaction." Louisiana Civil Procedure, Steven R. Plotkin, Book II Commentary following La. C.C.P. Art. 2031 (emphasis added)

36 *Gillson v. Vendome Petroleum Corp.*, 35 F.Supp. 815, (D.C. La. 1940)

revival upon the debtor, interrupted prescription and excused mortgagee's failure to initiate revival proceedings before the end of the prescriptive period. The state appeal court held that the state court's jurisdiction over revival proceeding did not depend on personal service of a suit on the original judgment debtor as:

> "A proceeding to revive a judgment is not a new action but merely a proceeding in the same action, the object of which is to continue in effect a judgment therein rendered." *Bahan v. Youngstown Sheet and Tube Company*, 191 So.2d 668, at p. 670 (La.App.2nd Cir. 1966)

citing, with approval, the 1955 Louisiana Supreme Court decision in *Wilson v. King*, which reads:

> "An action to revive a money judgment is not a new suit but is part of the original action. Jaubert Bros. v. Landry, La.App., 15 So.2d 158; Blanchard v. Smith, La.App., 45 So.2d 527; Scherrer v. Caneza, 33 La.Ann. 314; Hayden v. Slaughter, 43 La.Ann. 385, 388, 8 So. 919; Carter v. State, 49 La.Ann. 1487, 1489, 22 So. 400." *Wilson v. King*, 227 La. 546, 79 So.2d 877, at p. 878 (1955) (emphasis added)

The *Bahan* court also ruled (at page 671):

> "Moreover, an action is pending so long as the judgment remains unsatisfied and is not prescribed."

Prior to the decision of *Cassiere v. Cuban Coffee Mills* the Louisiana Supreme Court had held:

> "In Hammett v. Sprowl, 31 La.Ann.[325,] 327, our predecessors held that it was exclusively within the power of the court rendering the judgment 'to enforce and to revive it;' and they further held that 'a proceeding to revive a judgment [is] not a new suit but simply a proceeding in the same suit to furnish proof that it has not been satisfied or extinguished.' To the same effect is their opinion in Succession of Patrick, 30

> La.Ann. 1071, in which a suit to revive is denominated 'the peculiar statutory action' provided for the continuation of judgments beyond their term of 10 years." *Bertron v. Stewart*, 43 La.Ann. 1171, 10 So. 295, at p. 296 (1891).(emphasis added)

The *Bahan* court quoted the above citation from *Bertron v. Stewart*, verbatim, with approval (at page 671).

In 1960 the substantive law portion of Code Article 3547 referenced in the Louisiana Supreme Court's 1954 *Cassiere v. Cuban Coffee Mills* decision was amended to La. C.C. Art. 3501 and the procedural portion transferred to La. C.C.P. Art. 2031. In 1955, after the *Cassiere v. Cuban Coffee Mills* decision but before Code Article 3547 was amended, the Louisiana Supreme Court decided *Wilson v. King*. Even though decided by the Louisiana Supreme Court under the same Code Article as, and within one year of, *Cassiere*, *Wilson v. King* (quoted above) definitively does not hold that a separate action was required under Code Article 3547 for revival of judgment in Louisiana. Further, the language of La. C.C.P. Art. 2031 is that

> "A money judgment may be revived at any time before it prescribes by an interested party in an ordinary proceeding brought in the court in which the judgment was rendered."(emphasis added)

However, the U.S. Court of Appeals for the Fifth Circuit has affirmed the U.S. District Court, Middle District of Louisiana's denial of jurisdiction to grant petitioner's motion for revival of judgment to avoid the effect of Louisiana's statute of limitations for the reason that "Louisiana courts have held that revival of judgment under Article 2031 requires the filing of a suit in ordinary proceedings."

REASON NO. 5 - MODIFICATION OF A SUBSTANTIVE RIGHT

28 U.S.C. § 2072 provides that the U.S. Supreme Court has the power to prescribe general rules of practice and procedure in federal

district courts. Sub-paragraph (b) of § 2072 prohibits the Supreme Court from establishing any rule that abridges or modifies any substantive right. The U.S. Supreme Court has ruled that revival of judgment to avoid the effect of a statute of limitations is a substantive right.[37] The U.S. Court of Appeals for the Ninth Circuit has ruled that revival of judgment is a substantive right.[38]

Should it be that after adoption of the Federal Rules of Civil Procedure a federal district court's jurisdiction to grant revival of its own money judgment to avoid the effect of a forum state's statute of limitation is dependent upon utilization of a forum state's procedure for revival by the judgment creditor, pursuant to Fed. R. Civ. P. 69(a), this petition for a writ of certiorari, in part, seeks to have the U.S. Supreme Court consider the issue of whether Fed. R. Civ. P. 69(a) or 81(b) complies with 28 U.S.C. § 2072(b).

DAVID L. SMITH, Petitioner
In Proper Person
2834 S. Sherwood Forest Blvd.
c/o Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

---

37 "...State law determines when a Federal judgment becomes dormant but not the substantive right of revival. The fact that Scire Facias proceeding is a supplementary action does not preclude the revival action here since the action on the dormant judgment is substantive, not procedural." *United States v. Jenkins*, 141 F.Supp. 499, at p. 503 (S.D.Ga. 1956), *aff'd*, 238 F.2d 85 (5th Cir. 1956) (per curiam), *appeal dismissed*, 352 U.S. 1029, 77 S.Ct. 595, 1 L.Ed.2d 598 (1957) (emphasis added)

38 "We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action. Such a cause of action is a substantive right..., not its procedural remedy." *Miller v. United States*, 160 F.2d 608, at 609 (9th Cir. 1947)

INDEX TO APPENDIX

Opinion of the U.S. Court of Appeals for the Fifth Circuit, No. 96-30089, December 20, 1996 - unreported..... 1a

Opinion of the U.S. Court of Appeals for the Fifth Circuit, No. 96-30089, February 5, 1997 on petition for rehearing - unreported..... 4a

Opinion of the U.S. District Court, Middle District of Louisiana, No. 85-146-B-1, November 27, 1995 - unreported..... 6a

Opinion of the U.S. District Court, Middle District of Louisiana, No. 85-146-B-1, November 27, 1995 - unreported..... 8a

Opinion of the U.S. District Court, Middle District of Louisiana, No. 85-146-B-1, December 18, 1995 - unreported..... 10a

Opinion of the U.S. District Court, Middle District of Louisiana, C.H. Faulkenberry, Jr. vs. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc., No. 85-146-B-1, January 3, 1986 - unreported (also 1-1 in Lodgings)..... 12a

URBAN RESORTS GROUP, et al v. Dale M WHEELER, et al. No. 82-2470, 1996 WL 28507 (E.D.La. 1/22/96) - unreported (also 1-3 in Lodgings)..... 14a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 20 1996
CHARLES R. FULBRUGE III
CLERK

No. 96-30089
Summary Calendar

C. H. FAULKENBERRY, JR.,
Plaintiff,
DAVID L. SMITH, as assignee
of the interest of Plaintiff,
C. H. Faulkenberry, Jr.,
Movant-Appellant,

versus

JOHN ELKINS, BENEFITS SYSTEMS INC.,
and MICROBE MASTER, INC.,
Defendants-Appellees.

Appeal from the United States District Court for
the Middle District of Louisiana
(85-CV-146)

Before REAVLEY, JONES and STEWART, Circuit Judges.

PER CURIAM:*

David Smith complains of the denial of his motion to revive a 1986 judgment. We affirm.

On January 3, 1986, the United States District Court, Middle District of Louisiana entered a consent judgment (civil action

---

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4
s/TMR s/EHJ s/CES

number 85-146-B-1) in the amount of $30,000 in favor of plaintiff C.H. Faulkenberry, Jr. and against defendants John W. Elkins, Benefit Systems, Inc. and Microbe Masters, Inc.

David Smith claims an interest in the judgment as assignee from the sole heir of C.H. Faulkenberry, Jr. and now seeks revival of the January 1986 judgment against International Biochemicals Group (IBG), as corporate successor to Microbe Masters.

Appellant Smith moved the court below to be substituted as party plaintiff for the purpose of reviving the January 3, 1986 judgment, and to revive judgment. The District Court denied both motions. Smith then requested that IBG be served and ordered to appear and show cause as to why a writ of execution/fieri facias should not issue in its name. The District Court denied this motion, instructing appellant that he could file a separate action in the proper court, but refusing to reopen civil action 85-146-B-1.

Our only issue is whether the district court erred in denying the Motion to Revive Judgment filed by David Smith, and in denying the Motion to Substitute David L. Smith for original plaintiff Faulkenberry for the purpose of reviving the 1986 judgment. In its orders, the court questioned its jurisdiction to grant the revival and the substitution of parties.

Revival of a federal court judgment follows the procedural law of the forum state. Fed.R.Civ.P. 69(a). *Urban Resorts Group v. Wheeler*, No. 82-2470, 1996 WL 28507, 1 (E.D.La.1/22/96). Under Louisiana law, a money judgment may be revived by an "ordinary proceeding" brought in the court which rendered the original judgment. La. Code of Civ. Proc. Art. 2031.

Smith contends his motion to revive civil action number 85-146-B-1 qualifies as an ordinary proceeding, and that Fed.R.Civ.P. 81(b), abolishing the writ of *scire facias*, but not the relief available under such a writ, allows for revival of judgments by motion where the district court has already acquired jurisdiction. Louisiana courts have held that revival of judgment under Article 2031 requires the

filing of a suit in ordinary proceedings. *Mouton v. Watson*, 500 So.2d 792 (La.App.1 Cir. 1986), *Master Credit Plan, Inc. v. Angelo*, 437 So.2d 1201 (La.App.5 Cir. 1983), *Bahan v. Youngstown Sheet and Tube Company* 191 So.2d 668,671 (La.App.2nd Cir. 1966) citing *Cassiere v. Cuban Coffee Mills*, 74 So.2d 193 (La. 1954).

The district court could not look to the original record of civil action number 85-146-B-1, to determine jurisdiction over Smith or IBG. The court correctly questioned its jurisdiction to grant the order in the manner presented, and dismissed the motion to revive, reserving to the movant the right to refile.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S.COURT OF APPEALS

No. 96-30089
Summary Calendar

FILED

FEB 5 1997

CHARLES R. FULBRUGE III
CLERK

C. H. FAULKENBERRY, JR.,
Plaintiff

DAVID L. SMITH, as assignee
of the interest of Plaintiff,
C. H. Faulkenberry, Jr.,
Movant-Appellant

v.

JOHN ELKINS, BENEFITS SYSTEMS INC.,
MICROBE MASTER,INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING

Before REAVLEY, JONES and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file

petition for rehearing is granted.

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

CLERK'S NOTE:

ENTERED FOR THE COURT:

SEE FRAP AND LOCAL

s/ Thomas M. Reavley RULES 41 FOR STAY OF THE

THOMAS M REAVLEY MANDATE.

United States Circuit Judge

UNITED STATES DISTRICT COURT FILED

U.S. DIST. COURT
MIDDLE DIST. OF LA.
1995 NOV 27 PM 4:03

[s/illegible] 12/13/95
Deputy Clerk MIDDLE DISTRICT OF LOUISIANA
Richard T. Martin
Clerk of U.S. District Court
Middle District
[remainder of stamp illegible]

SIGN_____
RICHARD T. MARTIN
CLERK

C.H. FAULKENBERRY, JR — CIVIL ACTION

VERSUS — NO. 85-146

JOHN ELKINS
BENEFITS SYSTEMS, INC.
MICROBE MASTERS, INC. — SECTION "B"

ORDER

After considering that the statute of limitations is about to run on the judgment rendered in this matter January 3, 1986 in favor of plaintiff and the Motion to Revive Judgment and affidavit entered by David L. Smith as transferee of original plaintiff herein

IT IS ORDERED, ADJUDGED and DECREED that the judgment rendered herein January 3, 1986 in favor of C. H. Faulkenberry, Jr. and against defendants, John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc. in the amount of THIRTY THOUSAND AND NO/100 ($30,000.00 DOLLARS) with legal interest from January 3, 1986 until paid be revived for the maximum extended period as provided by law.

Baton Rouge, Louisiana this ____ day of _____, 19___.

_____
Judge Frank J. Polozola
Middle District of Louisiana

DKT. & ENTERED

DATE_____
NOTICE MAILED TO:

DATE 11/28/95 BY [s/illegible]

Brumfield
Watts
FP DM

ORDER

The Court cannot grant this motion in the manner presented. The plaintiff still has counsel of record and is the party plaintiff. ~~There is no evidence of any document which transfers the judgment.~~ Also the Court questions its jurisdiction to grant the order in the manner presented. The Court reserves to the proposed intervenor the right to refile the motion in this court or in an appropriate state court.

s/Frank J. Polozola
11 - 27 - 95

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA.
1995 NOV 27 PM 4:03

SIGN_____
RICHARD T. MARTIN
CLERK

C.H. FAULKENBERRY, JR — CIVIL ACTION

VERSUS — NO. 85-146

JOHN ELKINS
BENEFITS SYSTEMS, INC.
MICROBE MASTERS, INC. — SECTION "B"

ORDER

Considering the Motion to Substitute entered by David L. Smith as transferee of the original plaintiff

IT IS ORDERED that David L. Smith be substituted as plaintiff in this matter to enter a Motion to Revive Judgment.

Baton Rouge, Louisiana this ___ day of _____, 19___.

_____
Judge Frank J. Polozola
Middle District of Louisiana

[s/illegible] 12/13/95
Deputy Clerk
Richard T. Martin, Clerk U.S. District Court
Middle District
[remainder of stamp illegible]

ORDER

The Court cannot grant the order at this time for the reason previously stated. The Court questions its jurisdiction to grant the relief requested.

s/Frank J. Polozola
11 - 27 - 95

DKT. & ENTERED

DATE_____
NOTICE MAILED TO:

DATE 11/28/95 BY [s/illegible]

Brumfield
Watts
FP DM

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA.
1995 DEC 19 AM 12:19

SIGN_____
RICHARD T. MARTIN
CLERK

C.H. FAULKENBERRY, JR — CIVIL ACTION

VERSUS — NO. 85-146

JOHN ELKINS
BENEFITS SYSTEMS, INC.
MICROBE MASTERS, INC. — SECTION "B"

ORDER

Considering the Motion to Substitute and Show Cause entered by David L. Smith as assignee of the interest of the original plaintiff

IT IS ORDERED that David L. Smith, as assignee of the interest of the original plaintiff C. H. Faulkenberry, Jr., be substituted as plaintiff for purposes of Show Cause Order and requesting Writ of Execution/Fieri Facias be issued in the name of International Biochemicals Group, Inc.

IT IS FURTHER ORDERED that International Biochemicals Group, Inc. be served and ordered to appear and Show Cause at a hearing to be held _____, 19___ at _____ o'clock why it should not be substituted as defendant/judgment debtor in place of original defendant/judgment debtor Microbe Masters, Inc. and why a Writ of Execution/Fieri Facias should not issue in the name of

International Biochemicals Group, Inc. directed to the Marshal of the United States District Court, Middle District of Louisiana, to seize and sell the movable and immovable property described on EXHIBIT 5 attached to the Motion For Substitution and Show Cause to satisfy the obligation to pay the judgment rendered herein January 3, 1986 against original judgment debtor Microbe Masters, Inc.

Baton Rouge, Louisiana this ___ day of _____, 19___.

_____
Judge Frank J. Polozola
Middle District of Louisiana

DKT. & ENTERED

DATE_____
NOTICE MAILED TO:

DATE 12/19/95 BY Hj

FJP DM
Brumfield
Watts
Smith

Motion Denied.
Mover can file a separate action in the proper court having jurisdiction to enforce whatever rights he may have. The Court will not reopen the case.

s/Frank J. Polozola
12 - 18 - 95

RECEIVED
U.S. DIST. COURT
MIDDLE DIST. OF LA.
JAN 2 2 37 PM '86
LEE DUPUIS
CLERK

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

C. H. FAULKENBERRY, JR.	CIVIL ACTION
VERSUS	NO. 85-146
JOHN ELKINS, ET AL	SECTION "B"

* *

JUDGMENT

This matter cam for hearing on the 3rd day of January, 1986 and written
Considering the argument, evidence and stipulation of counsel:

IT IS ORDERED, ADJUDGED and DECREED that there be judgment herein in favor or petitioner, C. H. Faulkenberry, Jr., and against defendants, John Elkins, Benefits Systems, Inc., and Microbe Masters, Inc., in the amount of THIRTY THOUSAND AND NO/100 ($30,000.00) DOLLARS in settlement of his Keogh account with legal interest until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner, C. H. Faulkenberry, Jr., return unto John Elkins, Benefits Systems, Inc., and Microbe Masters, Inc. the gold coins and

BEST AVAILABLE COPY

Microbe Masters stock which he has received from defendants.

Judgment read, rendered and signed, this 3 day of January 1986, at Baton Rouge, Louisiana.

s/Frank J. Polozola
JUDGE

Approved:

BRUMFIELD & BRUMFIELD
509 St. Louis Street
Post Office Box 91200
Baton Rouge, Louisiana 70821-9200

SEALE, SMITH & PHELPS
Two United Plaza
8550 United Plaza Blvd.
Baton Rouge, Louisiana 70809

BY: s/William P. Brumfield
WILLIAM P. BRUMFIELD

BY: s/ Charles K. Watts
CHARLES K. WATTS

NOTICE MAILED TO:

DATE 1/3/86 BY [s/illegible]

Brumfield
Watts
[illegible]

___FEE_____
___PROCESS_____
X__CHARGE___PD_____
___INDEX_____
___ORDER_____
___HEARING___9_____
DOCUMENT_____

Not Reported in F.Supp.
(Cite as: 1996 WL 28507 (E.D.La.))

URBAN RESORTS GROUP, et al

v.

Dale M WHEELER, et al.

No. Civ. A. 82-2470

United States District Court, E.D. Louisiana

Jan. 22, 1996.

BERRIGAN, District Judge.

*1 IT IS ORDERED that the motion for judgment on the pleadings filed by the plaintiffs, previously noticed for hearing on January 24, 1996, is hereby GRANTED. The plaintiffs seek by this motion to revive a 1984 judgment in their favor. The Court appointed a curator for the absentee defendants, who was unable to locate and notify the defendants of this proceeding.

The governing law relating to the revival of judgments derives from statutes pertaining to execution. The law pertaining to money judgments is found in Fed. R. Civ. Pro. 69(a), which provides in pertinent part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to an in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Under 28 U.S.C. § 1962:

> Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time.

> Relevant Louisiana law provides in pertinent part:
> A money judgment rendered by a trial court of this state is prescribed by the lapse of ten years from its signing if no appeal has been taken, or, if an appeal has been taken, it is prescribed by the lapse of ten years from the time the judgment becomes final.

La. Civ. Code art. 3501. Here, there is no issue surrounding the timeliness of the filing of the complaint to revive the judgment. Rather, the defendants argue that revival is not appropriate because of post-filing delay.

Specifically, the defendants argue that service of the complaint exceeded 180 days from its filing and over 120 days from the date that the curator for the absent defendants was appointed. Therefore, they conclude, dismissal without prejudice is mandatory under Fed. R. Civ. Pro. 4(m), which provides in pertinent part:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

The Court is aware of the delays in service reflected in the record. However, it previously did find good cause shown as to each

of the rules to show cause issued with regard to service on February 23, 1995, March 9, 1995, and March 22, 1995.

In addition, it should be noted that an additional delay was caused by the appointment of a curator for the absentee defendants. That appointment occurred on November 23, 1994, and service was effected four months later on March 22, 1995, a delay which approximates the 120 days contemplated by Rule 4(m). Under these circumstances, the Court determines that dismissal is not appropriate.

*2 As a final note, the Court wants to acknowledge the pro bono representation of the absentee defendants by Benjamin O. Schupp. His representation was exemplary and deeply appreciated by the Court.

END OF DOCUMENT

Corp. © West 1996 No claim to orig. U.S. govt. works

NO. 96-1655

Supreme Court, U.S.
FILED
MAY 22 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

DAVID L. SMITH, as assignee of the interest of original Plaintiff, C. H. FAULKENBERRY, JR.,
Petitioners,

vs.

JOHN ELKINS, BENEFITS SYSTEMS, INC., MICROBE MASTERS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO SUGGEST MOOTNESS

J. RODNEY RYAN, JR.
Counsel of Record
JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE, L.L.P.
Attorneys for International Biochemicals Group, Inc., Amicus Curiae
8555 United Plaza Boulevard
Fifth Floor
Baton Rouge, Louisiana 70809
(504) 231-2000

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

20 pp

MOTION TO SUGGEST MOOTNESS

I. Introduction

International Biochemicals Group, Inc., ("IBG"), *amicus curiae,* [1] pursuant to United States Supreme Court Rule 21.2(b), suggests to the Court that the petition for writ of certiorari filed by David L. Smith ("Smith") is moot.

Smith attempted to revive by motion a federal consent judgment that was assigned to him by the wife of the deceased plaintiff in the original matter of *C. H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc.*, Civil Action No. 85-146-B-1, United States District Court of the Middle District of Louisiana ("Original Action"). The District Court denied Smith's motion to revive the judgment. The United States Fifth Circuit Court of Appeals affirmed holding that Smith's motion to revive a federal judgment could not be maintained, because revival of federal judgments in district courts in Louisiana can only be instituted by an ordinary proceeding as required by Louisiana law. (Smith Petition for Writ of Certiorari, Appendix 1a).

II. Facts that Suggest Mootness

While his appeal to the Fifth Circuit was pending Smith filed a complaint to revive the federal judgment in an ordinary proceeding in the matter of *David L. Smith v. International Biochemicals Group, Inc.,* Civil Action No. 95-2041-A-1, United States Court of the Middle District

---

[1] IBG filed this motion at the same time as its motion for leave to file brief of amicus curiae in opposition to the petition for writ of certiorari and in support of respondent, Microbe Masters, Inc.

of Louisiana ("Revival Action"). (Appendix A and B, p. A-3 and A-5, respectfully). The complaint was filed within the prescriptive period applicable for judgments under Louisiana law and in effect cured Smith's procedural deficiency. The district court then consolidated the Original Action and Smith's Revival Action. (Appendix A, p. A-3).

The consolidated action is now pending before the district court. IBG is a named defendant in the complaint, because it is alleged that IBG is the corporate successor to Microbe Masters, Inc. ("MMI"), one of the named defendants in the Original Action. (Appendix B, p. A-5-A-7). IBG has answered Smith's complaint, specifically asserting that the consent judgment is not enforceable against IBG, because MMI was never served with the original complaint making the judgment a nullity as to MMI and, alternatively, the original consent judgment was satisfied as to MMI by a partial cancellation in favor of MMI (Appendix C, p. A-12-A-13). Thus, the merits of Smith's claims for revival of the judgment assigned to him is presently being litigated in the district court.

II. Argument and Law

Both counsel for IBG and Smith have a continuing duty to bring to this Court's attention facts that raise questions of mootness, which may, in turn, affect the jurisdiction of this Court to even hear the appeal. See, *Arizonia for Official English v. Arizonia,* ____U.S.____, 117 S.Ct. 1055, at 1069, n. 23, 137 L.Ed.2d 170, at 194, n. 23 (1997). This duty is continuing and requires that counsel inform the Court of questions of mootness at any stage in the proceedings. *Id.* Facts that suggest mootness cannot be withheld from the Court and must be disclosed. *Id.*

Smith's petition for writ of certiorari seeks review of the Fifth Circuit's ruling that Smith cannot revive a federal judgment in federal district court in Louisiana by motion, because state law requires that revival be instituted by an "ordinary proceeding." Smith's petition fails to even mention the fact that he cured the procedural deficiency by filing an ordinary action in the district court.

Smith's filing of the "ordinary proceeding" cures the procedural deficiency and allows Smith to attempt to revive the federal judgment. In *Deacons v. Monoghan,* 484 U.S. 193, at 199-200, 108 S.Ct. 523, at 528, 98 L.Ed.2d 529, at 538 (1988), the Court dismissed an appeal after the plaintiffs, respondents, voluntarily asserted that they would no longer pursue their claim for equitable relief in federal court and would only seek relief in state court. Because Smith has voluntarily removed the procedural deficiency that prevented his attempt to revive the judgment, there is no longer a controversy and his petition should be denied because the question is now moot.

Respectfully submitted,

J. RODNEY RYAN, JR.
Counsel of Record
JONES, WALKER, WAECHTER,
POITEVENT, CARRÉRE & DENÉGRE,
L.L.P.
Attorneys for International Biochemicals Group, Inc., Amicus Curiae

APPENDIX A

APPEAL CLOSED
LEAD

U. S. District Court
Middle District of Louisiana (Baton Rouge)
CIVIL DOCKET FOR CASE#: 85-CV-146

Faulkenberry v. Elkins, et al — Filed: 2/19/85
Assigned to: Judge Frank J. Polozola
Demand: $0,000 — Nature of Suit: 890
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 15:77 Securities Fraud

C H FAULKENBERRY, JR plaintiff	William P. Brumfield [COR LD NTC] Brumfield & Brumfield P. O. Box 91200 Baton Rouge, LA 70821 22033 504-343-0618
v.	
JOHN ELKINS defendant	Charles K. Watts [COR LD NTC] Seale, Smith, Zuber & Barnette 8550 United Plaza Bldg. Suite 200 Baton Rouge, LA 70809 22033 504-924-1600

Docket as of April 5, 1996 9:23 am

BENEFITS SYSTEMS INC defendant	Charles K. Watts (See above) [COR ld BTC]
MICROBE MASTER INC defendant	Charles K. Watts (See above) [COR LD NTC]
INTERNATIONAL BIOCHEMICAL GROUP consolidated defendant	Alton E. Bayard, III [COR LD NTC] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Place St. Charles 201 St. Charles Avenue 50th Floor New Orleans, LA 70170 22071 504-582-8272 Michele Whitesell Crosby 504-231-2092 [COR] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Four United Plaza 8555 United Plaza Blvd. 5th Floor Baton Rouge, LA 70809-7000 22033 504-231-2000 FTS 231-2010

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

__/19/85 - This is a skelton docket sheet consisting only of pleadings that were filed after the case closed. (hj) [Entry date 12/14/95]

1/2/86 - Case closed (hj) [Entry date 12/14/95]

11/21/95 10 MOTION by CH Faulkenberry Jr for substitution of party plaintiff by the purpose of a motion to receive the judgment. (hj) [Entry date 12/14/95]

11/21/95 11 MOTION by CH Faulkenberry Jr to revive judgment (hj) [Entry date 12/14/95]

11/27/95 12 ORDER denying [10-1] motion for substitution of party plaintiff...(signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [Entry date 12/15/95]

11/27/95 13 ORDER denying [11-1] motion to revive judgment... (signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [12/15/95]

12/14/95 14 MOTION to substitute David L. Smith as party and for Microbe Master, Inc. and International Biochemicals Group to Show Cause why a Writ of Execution/Fieri Facias should not issue (hj) [Entry date 12/15/95]

12/19/95 15 ORDER denying [14-1] motion to substitute David L. Smith as party plaintiff and show cause (signed by Judge Frank J. Polozola), issued notices (hj)

12/27/95 16 NOTICE OF APPEAL by David L. Smith...on order denying Motion to substitute plaintiff. Appeal record due on 1/26/96 (hj) [Entry date 01/03/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

1/11/96	17	LETTER to Mr. David L. Smith from Richard T. Martin, Clerk RE: Writ of execution (hj) [Entry date 01/12/96]
1/18/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
1/22/96	18	ORDER...CA 95-2041 is hereby consolidated with CA 85-146 and CA 95-2041 is transferred from Section A to Section B (signed by Judge Frank J. Polozola), issued notices. (hj)
1/22/96	-	Consolidated Lead Case (hj) [Entry date 02/06/96]
1/31/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
2/5/96	-	SUMMONS(ES) issued for international Group. Service deadline set for 2/19/96. Consent Notices Mailed. (hj) [Entry date 02/06/96]
2/6/96	19	LETTER to Clerk from David Smith RE: Change of Address. (hj) [Entry date 02/07/96)
2/8/96	20	LETTER to Clerk from Charles Watts RE: A partial cancellation of judgment and judicial mortgage (copies attached) (hj) [Entry date 02/09/96]
2/8/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 02/09/96]
2/13/96	21	MOTION by David L. Smith to appeal order rendered 12/13/95 denying motion to substitute and rule to show cause (hj)
2/22/96	-	USCA appeal fees received FILING FEE $ 105.00 RECEIPT # 58532 (hj) [Entry date 02/23/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

3/22/96	22	ANSWER to Complaint by International Croup (Attorney Alton E. Bayard III, Michele Whitesell Crosby), (sh)
3/28/96	-	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [16-1] appeal by David L. Smith (hj)
4/1/96	23	STATUS REPORT by David L. Smith (hj) [Entry date 04/02/96]
4/3/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 04/04/96]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

PETITION TO REVIVE JUDGMENT

The petition of David L. Smith, a resident of East Baton Rouge Parish, Louisiana respectfully represents:

I.

This is a petition for revival against the successor corporation to the original judgment debtor corporation **Microbe Masters, Inc.** of a judgment granted by this court January 3, 1986 in Civil Action 85-146 "C. H. Faulkenberry, Jr. versus Elkins, Benefits Systems, Inc., Microbe Masters, Inc." and is a matter ancillary to the original action and independent grounds of jurisdiction are not required.

II.

Defendant **International Biochemicals Group, Inc.** is a for profit corporation organized under the laws of the State of Deleware but is authorized to transact business in Louisiana and maintains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed

Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent in Louisiana.

III.

Defendant **International Biochemicals Group, Inc.** was formerly known as **Environmental Remediation, Inc.** having amended its Articles of Incorporation on June 23, 1994. **Environmental Remediation, Inc.** was formerly known as **Innovative Ventures Group, Inc.** was incorporated in accordance with the laws of the State of Deleware on December 3, 1991.

IV.

At 11:59 P.M. on June 30, 1992, defendant **International Biochemicals Group, Inc.,** f/k/a **Environmental Remediation, Inc.** f/k/a **Innovative Ventures Group, Inc.,** pursuant to terms of merger contained in a **CERTIFICATE OF OWNERSHIP AND MERGER** between and among Environmental Solutions, Inc., Environmental Solutions Industries, Inc. ERI Environmental Services, Inc. Environmental Remediation Field Services, Inc., ERI Environmental Services of California, Inc., **Environmental Remediation, Inc.** and **Innovative Ventures Group, Inc.** dated June 5, 1992, assumed all of the liabilities of its sole shareholder/parent corporation **Environmental Remediation, Inc.,** a Deleware corporation.

V.

This prior corporation bearing the name **Environmental Remediation, Inc.** is believed to be the **Environmen-**

tal Remediation, Inc. identified in an act of **TRANSFER OF ASSETS OF MICROBE MASTERS, INC. IN LIQUIDATION** dated January-30, 1991 as the sole shareholder of **Microbe Masters, Inc.** In this act of transfer in liquidation J. Peter Perez, as Liquidator of **Microbe Masters, Inc.**, conveyed all the property of **Microbe Masters, Inc.** to **Environmental Remediation, Inc.**, it sole shareholder and J. Peter Perez, as President of **Environment Remediation, Inc.**, sole shareholder of **Microbe Masters, Inc.**, in the same act of transfer in liquidation accepted the transfer of all the assets of **Microbe Masters, Inc.** and assumed liability for any and all debts or liabilities of **Microbe Masters, Inc.** of whatever description. And, thus, petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is the legal successor to **Microbe Masters, Inc.** and has assumed the obligation to pay all liabilities of **Microbe Masters, Inc.**, a Louisiana corporation.

VI.

One of those liabilities was that created by a judgment on the 3rd of January, 1986, in the matter entitled "D. H. Faulkenberry, Jr. versus John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.", Civil Action No. 85-146 in the United States District Court, Middle District of Louisiana, rendered in favor of plaintiff C. H. Faulkenberry, Jr. and against defendants John Elkins, Benefits Systems, Inc., and **Microbe Masters, Inc.** in the amount of THIRTY THOUSAND AND NO/100 ($30,000.00) DOLLARS in settlement of his Keogh account with legal interest until paid. This judgment has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on April 30, 1987 at Original 440 Bundle 9918.

VII.

Claude Hiram Faulkenberry, Jr. (plaintiff C. H. Faulkenberry, Jr. in Civil Action No. 85-146) died on July 5, 1992 in Concordia Parish, Louisiana. A **STATUTORY WILL** executed on March 16, 1992 at Vidalia, Louiaiana by Claude Hiram Faulkenberry, Jr. was submitted for probate in "Succession of Claude Hiram Faulkenberry, Jr.", Probate No. 31230A, 7th Judicial District Court of the State of Louisiana, Parish of Concordia. The **STATUTORY WILL** of Claude Hiram Faulkenberry, Jr. named his widow Fern Lea Faulkenberry sole heir. **By. JUDGMENT OF POSSESSION** rendered September 8, 1992 in Probate No. 31230A, Fern Lea Arnold Faulkenberry was recognized and decreed to be the sole Universal Legatee of the entire estate of the decedent Claude Hiram Faulkenberry, Jr., and as such the owner, and she was sent into possession, without benefit of inventory of all the property of the succession of the decedent Claude Hiram Faulkenberry, Jr.

VII.

By act of **ASSIGNMENT OF JUDGMENT** dated October 26, 1993 Fern Faulkenberry assigned all of her interest in the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146, U.S. District Court, Middle District of Louisiana on January 3, 1986 to petitioner and at all times thereafter petitioner has been the owner of the interest of C. H. Faulkenberry, Jr. in the judgment in favor of C. H. Faulkenberry, Jr. and against John Elkins, Benefit Systems, Inc., and **Mircobe Masters, Inc.** in Civil Action 85-146. This act of **ASSIGNMANT OF JUDGMENT** has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on October 27, 1993 at Original 561 Bundle 10450.

IX.

Petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is an obligor of the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146. Petitioner is the current owner of, and successor to, the interest of C. H. Faulkenberry, Jr. in the judgment rendered in Civil Action 85-146. Nothing has been paid on this judgment, the full amount of it is still due and the statute of limitations is about to run on the enforcement of the judgment and petitioner seeks to revive it for the maximum extended period permitted by law against **International Biochemicals Group, Inc.**, as successor to original judgment against the original judgment debtors John Elkins, Benefit Systems, Inc., and **Microbe Masters, Inc.** in the original action.

X.

Petitioner, as successor of the interest of C.H. Faulkenberry, Jr., is entitled to have this judgment revived before it prescribes.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

VERIFICATION

Personally come and appeared before me, the undersigned Notary Public, David L. Smith, Who being duly sworn, deposed and said that he is the petitioner in the foregoing petition and that all of the allegations of fact therein contained are true and correct except where made on information and belief which he believes to be true and correct to the best of his knowledge, information and belief.

s/David L. Smith
DAVID L. SMITH
2834 S. Sherwood Forest,
Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 28th day of December, 1995 in Baton Rouge, Louisiana.

s/Judy Stewart Patterson
NOTARY PUBLIC

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S PETITION TO REVIVE JUDGMENT

International Biochemicals Group, Inc. ("International Biochemicals") responds to the Petition to Revive Judgment ("petition") filed on December 28, 1995, by David L. Smith ("Smith") as follows.

First Defense

Smith fails to state a claim upon which relief can be granted.

Second Defense

Through Microbe Masters, Inc., was identified in the action, International Biochemicals avers that Microbe Masters, Inc. was not a party to Civil Action No. 85-146 "*C. H. Faulkenberry, Jr. v. John Elkins, Benefits System, Inc., Microbe Masters, Inc.,*" was not served in the suit, and was a stranger to the proceeding. International Biochemicals further avers that the court record containing pleadings from 1985 and 1986 was unavailable for review.

Third Defense

The judgment rendered in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" is a nullity as to Microbe Masters, Inc.

Fourth Defense

Alternatively, to the extent that the judgment is not a nullity, the judgment was satisfied as to Microbe Masters, Inc. by the partial cancellation of judgment and judicial mortgage filed and recorded in East Baton Rouge Parish as original 603, bundle 10012.

AND NOW, International Biochemicals responds to the individual paragraphs of the petition, as follows:

5.

International Biochemicals admits that it is the successor corporation to Microbe Masters, Inc., specifically denies that Microbe Masters, Inc. was an original judgment debtor of a judgment granted by the United States District Court, Middle District of Louisiana, on January 3, 1986, in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.*" and denies all other allegations in paragraph one of the petition.

6.

International Biochemicals admits it is a foreign corporation organized under laws of Deleware and authorized to do and doing business in the State of Louisiana, it main-

tains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent for service of process.

7.

International Biochemicals admits the allegations in paragraph three of the petition.

8.

International Biochemicals admits the allegations in paragraph four of the petition.

9.

International Biochemicals admits the allegations in paragraph five of the petition except it denied Smith's belief.

10.

International Biochemicals admits that a judgment was rendered in "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" Civil Action No. 85-146, in the United States District Court for the Middle District of Louisiana in favor of plaintiff, C.H. Faulkenberry, Jr. in the amount of $30,000 with legal interest until paid; that the judgment was recorded in the mortgage records of the East Baton Rouge Parish, State of Louisiana, on April 30, 1987, an original 440 bundle 9918; denies that it assumed any obligation created by that judgment and denies the remaining allegations contained in paragraph six of the petition.

International Biochemicals denies the allegations in paragraph seven for lack of sufficient information to justify a belief.

12.

International Biochemicals denies the allegations in paragraph eight for lack of sufficient information to justify a belief.

13.

International Biochemicals denies that it is an obligor of the judgment rendered in favor of C.H. Faulkenberry, Jr. in Civil Action No. 85-146: admits that petitioner filed a motion for revival of the judgment in Civil Action No. 85-146; and denies the remaining allegations in paragraph nine.

14.

International Biochemicals denies the allegations in paragraph ten.

WHEREFORE, defendant, International Biochemicals Group, Inc., prays that this answer be deemed good and sufficient and that after proceedings are had, the Court render judgment in favor of International Biochemicals and against David L. Smith dismissing this action with prejudice, and awarding it all costs expenses to which may be entitled, and awarding it all legal, equitable, general, and other relief to which it may be entitled.

Respectfully submitted,

s/Alton E. Bayard, III

Alton E. Bayard, III (Bar No. 2868)
Michele Whitesell Crosby
(Bar No. 20152)
Jones, Walker, Waechter, Poitevent, Carrére & Denégre, L.L.P.
One American Place, Suite 1700
Baton Rouge, Louisiana 70825
Telephone: (504) 377-8900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all known counsel of record by placing a copy of same in the U.S. Mail, postage prepaid, and properly addressed this 22nd day of March, 1996.

s/ Alton E. Bayard, III

Alton E. Bayard, III

NO. 96-1655

ORIGINAL

FILED

MAY 2?

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

DAVID L. SMITH, as assignee of the interest of original Plaintiff, C. H. FAULKENBERRY, JR.,
Petitioners,

vs.

JOHN ELKINS, BENEFITS SYSTEMS, INC., MICROBE MASTERS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

and

BRIEF OF AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

J. RODNEY RYAN, JR.
Counsel of Record
JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE, L.L.P.
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23 pp

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

I. Motion

International Biochemicals Group, Inc., ("IBG") moves this Court to file an *amicus curiae* brief supporting Microbe Masters, Inc., ("MMI") and opposing the petition for writ of certiorari filed by David L. Smith ("Smith").

Smith attempted to revive by motion a federal consent judgment that was assigned to him by the wife of the deceased plaintiff in the original matter of *C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc.*, Civil Action No. 85-146-B-1, United States District Court of the Middle District of Louisiana ("Original Action"). The District Court denied Smith"s motion to revive and the Fifth Circuit Court of Appeals affirmed.

IBG is the corporate successor to MMI, the original defendant. IBG was not permitted to file an opposition in the Fifth Circuit, because IBG was never made a defendant to the Original Action. However, the Fifth Circuit granted leave for IBG to file an *amicus curiae* brief. This Court should grant IBG's motion for the same reasons the Fifth Circuit allowed IBG to participate as *amicus curiae*. IBG is the only person that can inform the Court of the relevant law and facts in opposition to Smith's petition.

Pursuant to Rule 37.2 of the United States Supreme Court, counsel for IBG requested consent from Smith, petitioner, and John W. Elkins ("Elkins"), defendant in the original action, to file an amicus curiae opposition to Smith's petition for writ of certiorari. IBG could not obtain consent from the original defendants, Faulkenberry, Benefits Systems, Inc., and MMI, because Faulkenberry is deceased

and the two corporations are dissolved. Elkins consented in writing to IBG's request. Smith, to date, has refused IBG's request for consent.

Smith's refusal to consent forces IBG to file this motion for leave to ensure that the Court is fully briefed on the law and facts in this appeal.

II. Statement of Interest.

IBG is the corporate successor to MMI, named as a defendant in the Original Action. Smith, as assignee, is attempting to revive and enforce a consent judgment that was entered in January of 1983 in the Original Action. Smith, as assignee, moved the district court to substitute himself as party plaintiff for the purpose of reviving the consent judgment on November 21, 1995. On the same day, Smith moved the district court to revive the consent judgment. On November 27, 1995, prior to the expiration of the delays for responding to the motions, the district court denied both motions.

On December 14, 1995, Smith moved the district court again to substitute himself as party plaintiff and to order MMI and IBG to appear and show cause why a writ of execution/*fieri facias* should not issue against IBG. On December 19, 1995, prior to the expiration of the delays for responding to this motion, the district court denied the requested relief.

Smith then appealed the district court's decision to the United States Fifth Circuit Court of Appeals. The Fifth Circuit affirmed, holding that Smith could only revive the judgment in an "ordinary proceeding" and not by motion. Importantly, while the appeal was pending Smith filed a complaint to revive the federal judgment in an ordinary proceeding in the matter of *David L. Smith v. International Biochemicals Group, Inc.*, Civil Action No. 95-2041-A-1, United States District Court of the Middle District of Louisiana ("Revival Action"). The complaint was filed within the prescriptive period applicable for judgments under Louisiana

law and in effect cured by the procedural deficienty. The district court then consolidated the Original Action and Smith's Revival Action.

IBG answered Smith's complaint and the Revival Action is not being litigated in the district court. IBG assserts in its answer that the consent judgment is not enforceable against IBG, because MMI was never served with the original complaint making the judgment a nullity as to MMI and, alternatively, the original consent judgment was satisfied as to MMI by a partial cancellation that was executed by the plaintiffs in favor of MMI.

Although the facts surrounding the dispute in the Revival Action are not part of the record of the appeal before the Fifth Circuit, IBG is duty bound to disclose them to the Court, because they raise questions of whether this Court has jurisdiction to hear this appeal. See, *Arizona for Official English v. Arizona*, ____ U.S. ____, 117 S.Ct. 1055, at 1069, n. 23, 137 L.Ed.2d 170, at 194, n. 23 (1997).[1] Further, the fact that Smith did not disclose them to the Court highlights the need for IBG to file an *amicus curiae* opposition. IBG's participation in the proceedings is needed to fully inform the Court of all facts and law that are relevant to its review of Smith's petition for writ of certiorari.

III. Argument and Law

Rule 37 of the Supreme Court suggests that an amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help. IBG is the only person that can inform the Court of relevant law and facts in opposition to Smith's petition, because the three original defendants to the district court proceeding did not file any opposition. Further, since Smith is also attempting to revive and enforce the judgment against IBG, it is necessary for IBG to apprise

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[1] IBG has also filed a motion to suggest mootness in accordance with United States Supreme Court Rule 21.1(b).

this Court of its interest by presenting the resons why Smith's petition fails to satisfy any consideration for granting writs.

The most compelling reason for granting the requested leave to appeal *amicus curiae* is that there will be no party supporting the decision under review in absence of IBG. The District Court for the Middle District of Pennsylvania addressed a similar situation in which no other party or nonparty supported the decision under review. The court determined that when an appeal is taken from a district court order and no party to the appeal supports the decision under review, an appellate court may appoint an attorney as *amicus curiae* to defend the district court's decision, the purpose being to give the appellant court the benefit of an adversarial presentation of the issue. *Pennsylvania Environmental Defense Foundation v. Bellefonte Borough.* 718 F.Supp. 431, 434 (M.D.Pa. 1989). For the same reasons cited in the *Pennsylvania* decision, the Court should permit the appearance of IBG as *amicus curiae* to defend the decision of the district court in these proceedings. Participation of amicus curiae at the appellate level has become standard procedure. *Yip v. Pagano,* 606 F.Supp. 1566, 1568 (D.C.N.J. 1985), *affirmed,* 782 F.2d 1033 (3rd Cir. 1986), *cert. denied,* 476 U.S. 1141, 106 S.Ct. 2248, 90 L.Ed.2d 694 (1986).

Smith will likely assert that IBG should not be allowed to present an *amicus curiae* brief that is partial and that opposses his views. However, there are no strict prerequisites that must be established prior to qualifying for *amicus* status. An individual seeking to appear as *amicus curiae* must merely make a showing that his participation is useful to or otherwise desireable by the Court. *United States v. State of Louisiana,* 751 F.Supp. 608, 620 (E.D.La. 1990). There is no rule that *amici* must be totally be disinterested in the litigation. *Funbus Systems, Inc. v. C.P.U.C.,* 801 F.2d 1120, 1125 (9th Cir. 1986). *Bryant v. Better Business Bureau of Greater Maryland,* 923 F. Supp. 720, 728 (D.Md. 1996). By the nature of things, an *amicus* is not typically impartial.

IV. Conclusion

IBG requests that this Court allow it to appear in support of MMI and to defend the decision under review. This Court should allow IBG to file an *amicus curiae* opposition, because IBG is the only person that can inform the Court of relevant facts and law that are in opposition to Smith's petition.

Respectfully submitted,

J. RODNEY RYAN, JR.
Counsel of Record
JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE, L.L.P.
Attorneys for International Biochemicals Group, Inc., Amicus Curiae

QUESTION PRESENTED FOR REVIEW

International Biochemicals Group, Inc., as *amicus curiae,* presents the following question for review.

Whether compelling reasons for review are presented by the decision of the United States Fifth Circuit Court of Appeals that a federal consent judgment cannot be revived by motion in a district court in Louisiana, because Louisiana law requires the revival action to be prosecuted by ordinary proceedings.

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[1] See, Smith Petition for Writ of Certiorari, Appendix A-15 for full text of opinion.

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RELEVANT LOUISIANA LEGISLATION

The following Louisiana Legislation is provided to the Court in addition to those authorities cited in David L. Smith's petition for writ of certiorari.

Louisiana Civil Code Article 3300

A judicial mortgage is created by filing a judgment with the recorder of mortgages.

Louisiana Code of Civil Procedure Article 851

Three different modes of procedure are used in civil matters in the trial courts of this state: ordinary, summary, and executory.

The articles in this Book govern ordinary proceedings, which are to be used in the district courts in all cases, except as otherwise provided by law.

Summary and executory proceedings are regulated by the provisions of Book V.

Louisiana Code of Civil Procedue Article 2591

Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings.

STATEMENT OF THE CASE

1. Introduction

David L. Smith ("Smith"), petitioner, attempted to revive by motion a federal consent judgment that was assigned to him by the wife of the deceased plaintiff in the original matter of *C. H. Faulkenberry, Jr. v. John Elkins, Benefits System, Inc., and Microbe Masters, Inc.,* Civil Action No. 85-146-B-1, United States District Court of the Middle District of Louisiana ("Original Action"). The District Court denied Smith's motion to revive the judgment and the United States Fifth Circuit Court of Appeals affirmed. International Biochemicals Group, Inc. ("IBG"), as *amicus curiae* in support of original defendant Microbe Masters, Inc., opposes Smith's petition for writ of certiorari.

II. Course of Proceedings Below and Relevant Facts

Smith moved the district court to substitute himself as party plaintiff for the purpose of reviving a consent judgment entered in the Original Action, civil action number 85-146-B-1, in favor of C.H. Faulkenberry, Jr., and against John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc. ("MMI"). (Appendix A. p. A-3). Smith also requested that the District Court revive the consent judgment with a motion to revive (Appendix A. p. A-3). Prior to the expiration of the delays for responding to the motions, the district court denied both motions essentially ruling that the court lacked jurisdiction to hear the matter in the manner the motions were presented by Smith. (Smith Petition for Writ of Certiorari, Appendix, 7a and 8a).[1]

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[1] Hereinafter, "Smith Pet., App."

Smith then moved the district court again to substitute himself as plaintiff and to order MMI and IBG to appear and show cause why a writ of execution/fieri facias should not issue against IBG. (Appendix A,p. A-3). Prior to the expiration of the delays for responding to this motion the district court again denied Smith's motions and in its ruling questioned its jurisdiction to grant the relief in the manner requested by Smith. (Smith Pet. App. 10a).

Smith then appealed the district court's decision to the United States Fifth Circuit Court of Appeals. While the appeal was pending Smith filed a complaint to revive the federal judgment in an ordinary proceeding in the matter of *David L. Smith v. International Biochemicals Group, Inc.,* Civil Action No. 95-2041-A-1, Unitd States District Court of the Middle District of Louisiana ("Revival Action"). (Appendix B, p. A-6). The complaint was filed within the prescriptive period applicable for judgments under Louisiana law and in effect cured Smith's procedural deficiency. The district court then consolidated the Original Action and the Revival Action. (Appendix A, p. A-3).

The consolidated action is now pending before the district court. IBG answered Smith's complaint and asserted that the consent judgment is not enforceable against IBG, because: (1) MMI was never served with the original complaint making the judgment a nullity as to MMI; and (2) alternatively, the original consent judgment was satisfied as to Microbe Masters, Inc. by a partial cancellation, in favor of MMI. (Appendix C. p. A-12 - A-13).[2]

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[2] Although the facts surrounding theRevival Action are not part of the original appellate record before the Fifth Circuit Court of Appeal, counsel of IBG discloses them to the Court in view of the continuing duty to

Notwithstanding the Revival Action, the Fifth Circuit eventually affirmed the district court's ruling, holding that Smith's motion to revive a federal judgment could not be maintained because revival of federal judgments in district courts in Louisiana could only be instituted by an ordinary action as required by Louisiana law. (Smith Pet., App. 1a).

SUMMARY OF ARGUMENT

Under Supreme Court Rule 10 Smith's petition for writ of certiorari should show a compelling reason to review the Fifth Circuit decision. Compelling reasons generally include a decision by a United States court of appeals that decides an important federal question in conflict with decisions of this Court or other United States court of appeals on the same matter. See, U.S.Sup.Ct.Rule 10(a) and (c). This Court has also suggested that it hesitates to review lower federal court's interpretation of state law and will only do so in those limited cases where the decision unreasonably interprets state law. See, e.g., *Propper v. Clark,* 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949) and *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, at 500, 105 S.Ct. 2794, at 2800, 86 L.Ed.2d 394, at 403 (1985). Smith's petition for writ of certiorari fails to demonstrate that the Fifth Circuit decision meets any of these criteria.

The Fifth Circuit decision in this matter ruled that the

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footnote 2 continued

inform the Court of all facts that arise at any stage in the proceedings that could affect the jurisdiction of the Court to even hear the appeal. See, *Arizona for Official English v. Arizona,* ____U.S.____, 117 S.Ct. 1055, at 1069, n. 23, 137 L.Ed.2d 170, at 194, n. 23 (1997). As argued in IBG's Motion to Suggest Mootness, these facts should make Smith's petition moot.

revival of a federal court judgment follows the procedural law of the forum state. The court then concluded that Louisiana law allows an action for revival only by an "ordinary proceeding" and that Smith's attempt to obtain revival of the federal judgment by motion was improper. The Fifth Circuit decision does not offer a compelling question for this Court to review for two simple reasons.

I. The decision to apply Louisiana law is consistent with the Federal Rules of Civil Procedure, federal statutory law, and decisions of this Court and other federal courts. Federal rule of Civil Procure 81(b) abolishes the former method of reviving federal judgments by a writ of scire facias. However, Rule 81(b) also preserves the remedy available under the former writ of scire facias, provided the "appropriate action" or "appropriate motion" prescribed by the Federal Rules of Civil Procedure is followed. Unfortunately none of the procedural rules explain what is "appropriate."

The Fifth Circuit's decision to adopt state law to find the "appropriate" procedure for reviving a federal judgment is consistent with decisions of this Court and other federal decisions. This Court has consistently held that it is generally appropriate to adopt state statutes of limitations and their relevant provisions for tolling and revival in federal question cases; unless the adoption of state law interferes with federal law. See, *Hardin v. Straub,* 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989), *Board of Regents, Etc. v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980), and *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

The revival of judgments is the method of interrupting the statute of limitations for judgments. The applicable period

for the statute of limitations for federal judgments is governed by state law under 28 U.S.C. § 1962, unless the judgment is in favor of the United States or state law discriminates against federal judgments. The Fifth Circuit's adoption of Louisiana revival procedure is proper, because there is no confict between Louisiana law and federal law under 28 U.S.C. § 1962. The judgment in question is not in favor of the Unitd States. Louisiana law does not discriminate against federal judgments. Under Louisiana law the prescriptive[3] period for federal and state judgments are the same. La.Civ. Code art. 3501. Additionally, Louisiana Revised Statutes Title 13, Section 4204 permits a judgment rendered by a United States court of original jurisdiction of Louisiana to be filed in the same manner as a state court judgment.

II. This Court should not review the Fifth Circuit's interpretation of Louisiana law, because the decision is a reasonable construction of Louisiana law. The Fifth Circuit held that Louisiana law only allows revival of judgments by "ordinary proceedings" as required under Louisiana Code of Civil Procedure Article 2031. The Fifth Circuit's interpretation is not "unreasonable", because Article 2031 provides for revival only by "ordinary proceedings" and does not mention revival by motion or summary proceedings. Simply put, the "ordinary proceeding" under Article 2031 is the exclusive method in Louisiana by which a judgment can be revived and the prescriptive period for the judgment interrupted. See, *Cassiere v. Cuban Coffee Mills,* 74 So.2d 193 (La. 1954) and *Baham v. Youngstown Sheet and Tube Co.,* 191 So.2d 668, 671 (La. App. 2 Cir. 1966).

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[3] Louisiana law uses the term of prescription to describe what federal and other states' law call statutes of limitation.

ARGUMENT

II. THE FIFTH CIRCUIT DECISION IS CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL STATUTORY LAW, AND DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

The Federal Rule of Civil Procedure 81(b) abolishes the writ of *scire facias*[4], but preserves the relief that was available in the writ, provided that revial is "...obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." Athough Rule 81(b) preserves the remedy of revival formally available, it explicitly requires that revival be obtained by appropriate action or by appropriate motion under the practice prescribed in the Federal Rules of Civil Procedure. Unfortunately, the rules of civil procedure do not specify how to determine the "appropriate" procedure for revival. Federal law has, however, expressly set forth that state law generally governs the procedures for execution of a judgment[5] and for establishing a judicial lien over property in the state where the lien is being perfected.[6] Thus, there is an apparent gap in the Federal Rules of Civil Procedure regarding revival of federal judgments.

The Fifth Circuit's decision to adopt state procedural law for revival of judgments is consistent with the general principle that federal courts use state law to fill in the gaps

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[4] The writ of scire facias includes the remedy of revival of judgments.

[5] Federal Rule of Civil Procedure 69(a), 28 U.S.C.

[6] 28 U.S.C. § 1962.

of federal law. See, *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989); *Board of Regents, Etc. v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); and *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). In *Johnson, Tomanio,* and *Hardin,* this Court consistently held that it is generally appropriate to adopt state statutes of limitations and their relevant provisions for tolling and revival in federal question cases; unless the adoption of state law interferes with federal law. See, *Hardin v. Straub,* 490 U.S. at 539, 109 S.Ct. at 2000, 104 L.Ed.2d at 588; *Board of Regents, Etc. v. Tomanio,* 446 U.S. at 485, 100 S.Ct. at 1795-1796, 64 L.Ed.2d at 448; and *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 463-465, 95 S.Ct. 1722-1723, 44 L.Ed.2d at 303-304. This Court explains that state statutes of limitations and related lw regarding the implementation of the statutes of limitations should generally be tied together, because:

> In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Johnson v. Railway Express Agency, Inc., 421 U.S. at 464, 95 S.Ct. at 1722, 44 L.Ed.2d at 303. Thus, it follows that federal courts "should not unravel state limitation rules [including those rules that are interrelated to the statute of limitations], unless their full application would defeat the goals of the federal statute at issue." *Hardin v. Straub,* 490 U.S.

at 539, 109 S.Ct. at 2000, 104 L.Ed.2d at 588. (*citations omitted*).

These decisions apply with equal force to this case. Just as in *Hardin, Tomanio,* and *Johnson,* state law applies in determining the relevant period of statute of limitation for federal judgments. In fact, Congress expressly requires that state law apply in determining the "manner and time" in which federal judgments cease to be a lien on the property located in the state. 28 U.S.C. § 1962.[7] Under Louisiana law, a money judgment prescribes by the lapse of ten years from the date of rendition. La.Civ.Code art. 3501. Article 3501 allows the prescriptive period to be interrupted and started anew, if an interested person revives the judgment as provided in Louisiana Code of Civil Procedure Article 2031. Article 2031, in turn, requires that the judgment be revived "... by an interested party in an ordinary proceeding...." The prescriptive period of the judgment and the manner in which it is interrupted by revival is properly adopted under the rulings of this Court, unless the adoption of Louisiana law would be inconsistent with a relevant federal statute.

Here, the relevant statute is 28 U.S.C. § 1962, which sets forth the procedures for establishing judicial liens with federal judgments. Under § 1962, state law should not app-

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[7]28 U.S.C. § 1962 states, in pertinent part, "Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time...."

ly in two situations.[8] First, state law should not apply when a judgment is rendered in favor of the United States. Second, state law should not apply when it does not authorize federal judgments to be recorded in the same manner as state court judgments in establishing the judicial mortgage. Here, neither federal interest in § 1962 is violated.

The judgment in this matter is not in favor of the United States. Louisiana law provides that judicial mortgages are established by recording the judgment in the parish (county) where the property of the debtor exists. La. Civ. Code art. 3300. Louisiana Revised Statutes Title 13, Section 4204 permits a judgment rendered by a United States court of original jurisdiction of Louisiana to be filed in the same manner as a state court judgment. Finally, there is no discrimination under Louisiana law between the prescriptive period for federal and state judgments.[9] Thus, application of Louisiana law is proper, because it does not interfere with the federal interests expressed by Congress in 28 U.S.C. § 1962.

In addition to being consistent with decisions of this Court, the Fifth Circuit's decision to adopt Louisiana pro-

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[8] See, 28 U.S.C. § 1962, which states, "... This section does not apply to judgments entered in favor of the United States. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State."

[9] Under La. Civ. Code art. 3501 the period is ten years for all "trial courts" of Louisiana and does not discriminate between federal court judgments and state court judgments.

cedural law as the "appropriate" method for reviving the judgment under Rule 81(b) is also consistent with other federal court decisions. See, e.g., *United States v. Fiorala*, 869 F.2d 1425, 1426 (11th Cir. 1989)(relying on Alabama law to determine timeliness of a motion seeking revival); *Michael v. Smith*, 221 F.2d 59, 61 (D.C. Cir. 1955)(relying on District of Columbia law, which allows renewal by motion, to determine timeliness of a motion to renew judgment); *Urban Resorts Group v. Wheeler*, No. 82-2470, 1996, WL 28507, at 1 (E.D.La. 1/22/96)(relying on Louisiana law, which requires revival by petition, to determine timeliness of a complaint seeking revival of judgment)[10]; *Powles v. Kandrasiewicz*, 886 F. Supp. 1261, 1263-1264 (W.D.N.C. 1995)(relying on Alabama law, which allows revival by motion to determine timeliness of a motion to revive).

Smith's petition for writ of certiorari fails to make the requisite showing that the questions raised by the Fifth Circuit decision are compelling in nature and involve important federal questions in which there is significant disagreement with decisions of this Court or other federal courts. In fact, the Fifth Circuit decision is consistent with analogous decisions of this Court and other federal courts. Therefore, there is no compelling reason to review the decision of the Fifth Circuit to adopt Louisiana procedures for the "appropriate" method of revival under Rule 81(b).

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[10]The Fifth Circuit decision in this matter relied on *Urban Resorts Group v. Wheeler* in making its decision. For full text of opinion see, Smith Pet. App., A-14.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF LOUISIANA LAW IS NOT UNREASONABLE AND SHOULD NOT BE REVIEWED BY THIS COURT

Generally, this Court has indicated that it is "hesitant to overrule decisions by federal courts skilled in the law in particular states unless their conclusions are shown to be unreasonable." *Propper v. Clark*, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). This Court has deferred to the construction of a state statute given by the lower courts in light of the "... belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." See, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, at 500, 105 S.Ct. 2794, at 2800, 86 L.Ed.2d 394, at 403 (1985).

Here, there is no compelling reason to review the Fifth Circuit's interpretation of Louisiana law, because it merely follows the express language of Louisiana legislation. Louisiana Civil Code Article 3501 states that an interested party may revive a judgment "... before it prescribes, as provided in Article 2031 of the Code of Civil Procedure." Louisiana Code of Civil Procedure Article 2031 expressly provides that "[a] money judgment may be received at any time before it prescribes by an interested party in an ordinary proceeding brought in the court in which judgment was rendered."

The use of the phrase "ordinary proceeding" is significant, because under Louisiana law an "ordinary proceeding" is distinguishable from a "summary proceeding." Louisiana Code of Civil Procedure Article 2591 states that "[s]ummary proceedings are those which are conducted with rapidity...and without citation and the observance of all the formalities

required in ordinary proceedings." Further, Louisiana Code of Civil Procedure Article 851 mandates that the procedural rules for "... ordinary proceedings...be used in the district courts hin all cases, except as otherwise provided by law."

Therefore, the use of ordinary proceedings in Article 2031 and the omission of any provisions regarding summary proceedings or proceedings by motion show that the Louisiana's legislature intended that revival actions only be prosecuted by an "ordinary proceeding." Thus, the exclusive method by which the running of prescription on a money judgment may be interrupted is by filing suit to revive a judgment as provided under Louisiana Code of Civil Procedure Article 2031. *Cassiere v. Cuban Coffee Mills,* 74 So.2d 193 (La. 1954)(where the Louisiana Supreme Court was interpreting former Civil Code Article 3547 which had provided for interruption of prescription of a judgment by an ordinary proceeding); and *Baham v. Youngstown Sheet and Tube Co.,* 191 So.2d 668, 671 (La. App. 2 Cir. 1966)(applying Louisiana Code of Civil Procedure Article 2031).

In view of the express language of Articles 851, 2591 and 2031 and the Louisiana Supreme Court's finding that the exclusive method of interrupting prescription is through a revival action by "ordinary proceedings," the Fifth Circuit's interpretation of Louisiana law cannot be viewed as "unreasonable." Therefore, there is no compelling reason for this Court to review the Fifth Circuit's interpretation of Louisiana law.

CONCLUSION

The Fifth Circuit's decision to adopt Louisiana procedural law for reviving judgments is consistent with Federal Rules of Civil Procedure, federal statutory law, and decisions of this Court. The Fifth Circuit's interpretation of Louisiana law is not "unreasonable," because it merely follows the clear and unambiguous language in the Louisiana Code of Civil Procedure that requires that revival of judgments be instituted by an "ordinary proceeding."

Since there is no compelling reason to review the Fifth Circuit decision, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

J. RODNEY RYAN, JR.
Counsel of Record
JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE, L.L.P.

Attorneys for International Biochemicals Group, Inc., Amicus Curiae

APPENDIX A

APPEAL CLOSED
LEAD

U. S. District Court
Middle District of Louisiana (Baton Rouge)
CIVIL DOCKET FOR CASE#: 85-CV-146

Faulkenberry v. Elkins, et al — Filed: 2/19/85
Assigned to: Judge Frank J. Polozola
Demand: $0,000 — Nature of Suit: 890
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 15:77 Securities Fraud

C H FAULKENBERRY, JR
plaintiff

William P. Brumfield
[COR LD NTC]
Brumfield & Brumfield
P. O. Box 91200
Baton Rouge, LA 70821
22033
504-343-0618

v.

JOHN ELKINS
defendant

Charles K. Watts
[COR LD NTC]
Seale, Smith, Zuber & Barnette
8550 United Plaza Bldg.
Suite 200
Baton Rouge, LA 70809
22033
504-924-1600

Docket as of April 5, 1996 9:23 am

BENEFITS SYSTEMS INC defendant	Charles K. Watts (See above) [COR ld BTC]
MICROBE MASTER INC defendant	Charles K. Watts (See above) [COR LD NTC]

INTERNATIONAL BIOCHEMICAL GROUP consolidated defendant	Alton E. Bayard, III [COR LD NTC] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Place St. Charles 201 St. Charles Avenue 50th Floor New Orleans, LA 70170 22071 504-582-8272 Michele Whitesell Crosby 504-231-2092 [COR] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Four United Plaza 8555 United Plaza Blvd. 5th Floor Baton Rouge, LA 70809-7000 22033 504-231-2000 FTS 231-2010

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

__/19/85 - This is a skelton docket sheet consisting only of pleadings that were filed after the case closed. (hj) [Entry date 12/14/95]

1/2/86 - Case closed (hj) [Entry date 12/14/95]

11/21/95 10 MOTION by CH Faulkenberry Jr for substitution of party plaintiff by the purpose of a motion to receive the judgment. (hj) [Entry date 12/14/95]

11/21/95 11 MOTION by CH Faulkenberry Jr to revive judgment (hj) [Entry date 12/14/95]

11/27/95 12 ORDER denying [10-1] motion for substitution of party plaintiff...(signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [Entry date 12/15/95]

11/27/95 13 ORDER denying [11-1] motion to revive judgment... (signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [12/15/95]

12/14/95 14 MOTION to substitute David L. Smith as party and for Microbe Master, Inc. and International Biochemicals Group to Show Cause why a Writ of Execution/Fieri Facias should not issue (hj) [Entry date 12/15/95]

12/19/95 15 ORDER denying [14-1] motion to substitute David L. Smith as party plaintiff and show cause (signed by Judge Frank J. Polozola), issued notices (hj)

12/27/95 16 NOTICE OF APPEAL by David L. Smith...on order denying Motion to substitute plaintiff. Appeal record due on 1/26/96 (hj) [Entry date 01/03/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

1/11/96	17	LETTER to Mr. David L. Smith from Richard T. Martin, Clerk RE: Writ of execution (hj) [Entry date 01/12/96]
1/18/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
1/22/96	18	ORDER...CA 95-2041 is hereby consolidated with CA 85-146 and CA 95-2041 is transferred from Section A to Section B (signed by Judge Frank J. Polozola), issued notices. (hj)
1/22/96	-	Consolidated Lead Case (hj) [Entry date 02/06/96]
1/31/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
2/5/96	-	SUMMONS(ES) issued for international Group. Service deadline set for 2/19/96. Consent Notices Mailed. (hj) [Entry date 02/06/96]
2/6/96	19	LETTER to Clerk from David Smith RE: Change of Address. (hj) [Entry date 02/07/96)
2/8/96	20	LETTER to Clerk from Charles Watts RE: A partial cancellation of judgment and judicial mortgage (copies attached) (hj) [Entry date 02/09/96]
2/8/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 02/09/96]
2/13/96	21	MOTION by David L. Smith to appeal order rendered 12/13/95 denying motion to substitute and rule to show cause (hj)
2/22/96	-	USCA appeal fees received FILING FEE $ 105.00 RECEIPT # 58532 (hj) [Entry date 02/23/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

3/22/96	22	ANSWER to Complaint by International Croup (Attorney Alton E. Bayard III, Michele Whitesell Crosby), (sh)
3/28/96	-	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [16-1] appeal by David L. Smith (hj)
4/1/96	23	STATUS REPORT by David L. Smith (hj) [Entry date 04/02/96]
4/3/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 04/04/96]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH
VERSUS
INTERNATIONAL
BIOCHEMICALS GROUP, INC.

CIVIL ACTION
NO. 95-2041
SECTION A-1

PETITION TO REVIVE JUDGMENT

The petition of David L. Smith, a resident of East Baton Rouge Parish, Louisiana respectfully represents:

I.

This is a petition for revival against the successor corporation to the original judgment debtor corporation **Microbe Masters, Inc.** of a judgment granted by this court January 3, 1986 in Civil Action 85-146 "C. H. Faulkenberry, Jr. versus Elkins, Benefits Systems, Inc., Microbe Masters, Inc." and is a matter ancillary to the original action and independent grounds of jurisdiction are not required.

II.

Defendant **International Biochemicals Group, Inc.** is a for profit corporation organized under the laws of the State of Deleware but is authorized to transact business in Louisiana and maintains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed

Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent in Louisiana.

III.

Defendant **International Biochemicals Group, Inc.** was formerly known as **Environmental Remediation, Inc.** having amended its Articles of Incorporation on June 23, 1994. **Environmental Remediation, Inc.** was formerly known as **Innovative Ventures Group, Inc.** was incorporated in accordance with the laws of the State of Deleware on December 3, 1991.

IV.

At 11:59 P.M. on June 30, 1992, defendant **International Biochemicals Group, Inc., f/k/a Environmental Remediation, Inc. f/k/a Innovative Ventures Group, Inc.,** pursuant to terms of merger contained in a **CERTIFICATE OF OWNERSHIP AND MERGER** between and among Environmental Solutions, Inc., Environmental Solutions Industries, Inc. ERI Environmental Services, Inc. Environmental Remediation Field Services, Inc., ERI Environmental Services of California, Inc., **Environmental Remediation, Inc.** and **Innovative Ventures Group, Inc.** dated June 5, 1992, assumed all of the liabilities of its sole shareholder/parent corporation **Environmental Remediation, Inc.,** a Deleware corporation.

V.

This prior corporation bearing the name **Environmental Remediation, Inc.** is believed to be the **Environmen-**

tal Remediation, Inc. identified in an act of **TRANSFER OF ASSETS OF MICROBE MASTERS, INC. IN LIQUIDATION** dated January-30, 1991 as the sole shareholder of **Microbe Masters, Inc.** In this act of transfer in liquidation J. Peter Perez, as Liquidator of **Microbe Masters, Inc.**, conveyed all the property of **Microbe Masters, Inc.** to **Environmental Remediation, Inc.**, it sole shareholder and J. Peter Perez, as President of **Environment Remediation, Inc.**, sole shareholder of **Microbe Masters, Inc.**, in the same act of transfer in liquidation accepted the transfer of all the assets of **Microbe Masters, Inc.** and assumed liability for any and all debts or liabilities of **Microbe Masters, Inc.** of whatever description. And, thus, petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is the le al successor to **Microbe Masters, Inc.** and has assumed the obligation to pay all liabilities of **Microbe Masters, Inc.**, a Louisiana corporation.

VI.

One of those liabilities was that created by a judgment on the 3rd of January, 1986, in the matter entitled "D. H. Faulkenberry, Jr. versus John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.", Civil Action No. 85-146 in the United States District Court, Middle District of Louisiana, rendered in favor of plaintiff C. H. Faulkenberry, Jr. and against defendants John Elkins, Benefits Systems, Inc., and **Microbe Masters, Inc.** in the amount of THIRTY THOUSAND AND NO/100 ($30,000.00) DOLLARS in settlement of his Keogh account with legal interest until paid. This judgment has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on April 30, 1987 at Original 440 Bundle 9918.

VII.

Claude Hiram Faulkenberry, Jr. (plaintiff C. H. Faulkenberry, Jr. in Civil Action No. 85-146) died on July 5, 1992 in Concordia Parish, Louisiana. A **STATUTORY WILL** executed on March 16, 1992 at Vidalia, Louiaiana by Claude Hiram Faulkenberry, Jr. was submitted for probate in "Succession of Claude Hiram Faulkenberry, Jr.", Probate No. 31230A, 7th Judicial District Court of the State of Louisiana, Parish of Concordia. The **STATUTORY WILL** of Claude Hiram Faulkenberry, Jr. named his widow Fern Lea Faulkenberry sole heir. **By. JUDGMENT OF POSSESSION** rendered September 8, 1992 in Probate No. 31230A, Fern Lea Arnold Faulkenberry was recognized and decreed to be the sole Universal Legatee of the entire estate of the decedent Claude Hiram Faulkenberry, Jr., and as such the owner, and she was sent into possession, without benefit of inventory of all the property of the succession of the decedent Claude Hiram Faulkenberry, Jr.

VII.

By act of **ASSIGNMENT OF JUDGMENT** dated October 26, 1993 Fern Faulkenberry assigned all of her interest in the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146, U.S. District Court, Middle District of Louisiana on January 3, 1986 to petitioner and at all times thereafter petitioner has been the owner of the interest of C. H. Faulkenberry, Jr. in the judgment in favor of C. H. Faulkenberry, Jr. and against John Elkins, Benefit Systems, Inc., and **Mircobe Masters, Inc.** in Civil Action 85-146. This act of **ASSIGNMANT OF JUDGMENT** has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on October 27, 1993 at Original 561 Bundle 10450.

IX.

Petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is an obligor of the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146. Petitioner is the current owner of, and successor to, the interest of C. H. Faulkenberry, Jr. in the judgment rendered in Civil Action 85-146. Nothing has been paid on this judgment, the full amount of it is still due and the statute of limitations is about to run on the enforcement of the judgment and petitioner seeks to revive it for the maximum extended period permitted by law against **International Biochemicals Group, Inc.**, as successor to original judgment against the original judgment debtors John Elkins, Benefit Systems, Inc., and **Microbe Masters, Inc.** in the original action.

X.

Petitioner, as successor of the interest of C.H. Faulkenberry, Jr., is entitled to have this judgment revived before it prescribes.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

VERIFICATION

Personally come and appeared before me, the undersigned Notary Public, David L. Smith, Who being duly sworn, deposed and said that he is the petitioner in the foregoing petition and that all of the allegations of fact therein contained are true and correct except where made on information and belief which he believes to be true and correct to the best of his knowledge, information and belief.

s/David L. Smith
DAVID L. SMITH
2834 S. Sherwood Forest,
Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 28th day of December, 1995 in Baton Rouge, Louisiana.

s/Judy Stewart Patterson
NOTARY PUBLIC

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S PETITION TO REVIVE JUDGMENT

International Biochemicals Group, Inc. ("International Biochemicals") responds to the Petition to Revive Judgment ("petition") filed on December 28, 1995, by David L. Smith ("Smith") as follows.

First Defense

Smith fails to state a claim upon which relief can be granted.

Second Defense

Through Microbe Masters, Inc., was identified in the action, International Biochemicals avers that Microbe Masters, Inc. was not a party to Civil Action No. 85-146 "*C. H. Faulkenberry, Jr. v. John Elkins, Benefits System, Inc., Microbe Masters, Inc.,*" was not served in the suit, and was a stranger to the proceeding. International Biochemicals further avers that the court record containing pleadings from 1985 and 1986 was unavailable for review.

Third Defense

The judgment rendered in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" is a nullity as to Microbe Masters, Inc.

Fourth Defense

Alternatively, to the extent that the judgment is not a nullity, the judgment was satisfied as to Microbe Masters, Inc. by the partial cancellation of judgment and judicial mortgage filed and recorded in East Baton Rouge Parish as original 603, bundle 10012.

AND NOW, International Biochemicals responds to the individual paragraphs of the petition, as follows:

5.

International Biochemicals admits that it is the successor corporation to Microbe Masters, Inc., specifically denies that Microbe Masters, Inc. was an original judgment debtor of a judgment granted by the United States District Court, Middle District of Louisiana, on January 3, 1986, in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.*" and denies all other allegations in paragraph one of the petition.

6.

International Biochemicals admits it is a foreign corporation organized under laws of Deleware and authorized to do and doing business in the State of Louisiana, it main-

tains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent for service of process.

7.

International Biochemicals admits the allegations in paragraph three of the petition.

8.

International Biochemicals admits the allegations in paragraph four of the petition.

9.

International Biochemicals admits the allegations in paragraph five of the petition except it denied Smith's belief.

10.

International Biochemicals admits that a judgment was rendered in "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" Civil Action No. 85-146, in the United States District Court for the Middle District of Louisiana in favor of plaintiff, C.H. Faulkenberry, Jr. in the amount of $30,000 with legal interest until paid; that the judgment was recorded in the mortgage records of the East Baton Rouge Parish, State of Louisiana, on April 30, 1987, an original 440 bundle 9918; denies that it assumed any obligation created by that judgment and denies the remaining allegations contained in paragraph six of the petition.

International Biochemicals denies the allegations in paragraph seven for lack of sufficient information to justify a belief.

12.

International Biochemicals denies the allegations in paragraph eight for lack of sufficient information to justify a belief.

13.

International Biochemicals denies that it is an obligor of the judgment rendered in favor of C.H. Faulkenberry, Jr. in Civil Action No. 85-146: admits that petitioner filed a motion for revival of the judgment in Civil Action No. 85-146; and denies the remaining allegations in paragraph nine.

14.

International Biochemicals denies the allegations in paragraph ten.

WHEREFORE, defendant, International Biochemicals Group, Inc., prays that this answer be deemed good and sufficient and that after proceedings are had, the Court render judgment in favor of International Biochemicals and against David L. Smith dismissing this action with prejudice, and awarding it all costs expenses to which may be entitled, and awarding it all legal, equitable, general, and other relief to which it may be entitled.

Respectfully submitted,

s/Alton E. Bayard, III

Alton E. Bayard, III (Bar No. 2868)
Michele Whitesell Crosby
(Bar No. 20152)
Jones, Walker, Waechter, Poitevent, Carrére & Denégre, L.L.P.
One American Place, Suite 1700
Baton Rouge, Louisiana 70825
Telephone: (504) 377-8900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all known counsel of record by placing a copy of same in the U.S. Mail, postage prepaid, and properly addressed this 22nd day of March, 1996.

s/ Alton E. Bayard, III

Alton E. Bayard, III

ORIGINAL

Supreme Court, U.S.
FILED
MAY 23 1997
CLERK

No. 96 - 1655

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DAVID L. SMITH, as assignee of the interest of original Plaintiff, C. H. FAULKENBERRY, JR.

- Petitioner

vs.

JOHN ELKINS; BENEFITS SYSTEMS, INC.; MICROBE MASTERS, INC.

- Defendants

On Petition For Writ of Certiorari
To The United States Court of Appeals for the
Fifth Circuit

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

DAVID L. SMITH, Petitioner
In Proper Person
2834 S. Sherwood Forest Blvd.
c/o Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

6 pp

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

I. International Biochemicals Group, Inc. (IBG) is not an *amicus curiae*

IBG [Motion p.4] states that "[t]he most compelling reason for granting the requested leave to appeal *amicus curiae* is that there will be no party supporting the decision under review in absence of IBG". IBG even represents [Motion p.3] that "IBG is the only person that can inform the Court of relevant law and facts in opposition to Smith's petition, because the three original defendants to the district court proceeding did not file any opposition". There was no opposition filed and there is no party supporting the decision under review for reason that IBG ignored, or waived, rights.

This proceeding was initiated to revive a 1986 federal district court consent judgment in the original action. Pursuant to Fed. R. Civ. P. 81(b) the revival proceeding was "appropriately" initiated by motion against the original judgment debtors. Pursuant to Fed. R. Civ. P. 5 the attorney of record for the original judgment debtors was served. Subsequently, petitioner discovered that IBG was a possible legal successor to Microbe Masters, Inc. (MMI), one of the original judgment debtors, and an ORDER was sought, in the original action, to cause IBG to be served pursuant to Fed. R. Civ. P. 4 in order that status of IBG as a legal successor to an original judgment debtor, and obligor on the original judgment, could be determined. Again the attorney of record for the original judgment debtors was served and IBG, as well as the original judgment debtors, was "noticed".

Even though IBG knew that it was legal successor to MMI, and had assumed liability on all liabilities of MMI, IBG elected to ignore service and "notice" and did not respond, did not defend, did not appear in the District Court revival proceedings against MMI. The record so reflects. The record also reflects that no party, including MMI before dissolution and assumption of MMI's liabilities by IBG's former parent, sought relief from the original consent judgment.

On appeal in the Fifth Circuit, as pretended *amicus curiae*, IBG asserted that appeal was moot for the same reason as here but did not contend that jurisdiction of the appeal court was affected and did not seek Remand to cause trial of a purported defense to revival of the judgment against an original judgment debtor. Now IBG suggests to this Court that petitioner's application for Writ of Certiorari is moot but still does not seek Remand.

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. United States v. Munsingwear, Inc., 340 U.S. 36, at 39; 71 S.Ct. 104, at 106; 95 L.Ed. 36 (1950)

Evidently IBG is not interested in supporting MMI at trial of a purported defense to revival against MMI. IBG is not opposed to revival of the judgment against an original debtor, just the procedure used to do it. IBG is opposed to Federal Rules of Civil Procedure 81(b). There is no "gap" in the Federal Rules of Civil Procedures regarding revival of federal judgments. Rule 81(b) establishes that the Federal Rules of Civil Procedure, not a forum state's procedures, govern revival of a money judgment in federal district court.

II. Consent to file *amicus curiae*

IBG represents that Smith has refused to grant IBG's request for consent to file an *amicus curiae* Brief. IBG even represents that it "could not obtain consent from the original defendant ...MMI, because...[MMI was] dissolved". Let me get this straight - IBG was unable to get consent from itself to put forth a Brief in support of itself. George Orwell would be proud.

Smith is not opposed to IBG's Motion, or proposed *amicus curiae* Brief, or even its Motion Suggesting Mootness, to the extent that either bring to the attention of the Court relevant matter not already brought to its attention. While it is true that an *amicus curiae* does not have to be totally disinterested and may support any legal position or argument that the *amicus curiae* thinks will assist the Court, including a partisan position, an *amicus curiae* should not be a "party in disguise" trying to retrieve rights that were ignored, or waived. Smith is not opposed to IBG bringing to the attention of the Court the ARGUMENT [P. 7 through 14] of IBG's proposed Brief.

However, Smith is opposed to this Court's granting IBG's Motion for leave to file an *amicus curiae* Brief supporting MMI to the extent the Motion, or proposed *amicus curiae* Brief, injects extraneous pleadings as "facts" which are not in the record and are not relevant. If the extraneous pleadings were "facts", or were relevant, one of the lower courts would have considered them. Neither the Fifth Circuit nor Smith find IBG's Appendix B and C even remotely relevant. The Fifth Circuit specifically Ordered the exclusion of the pleadings appearing in IBG's Appendix B and C. Actually, even IBG doesn't find the "facts" relevant.

IBG's ARGUMENT [proposed Brief p. 7 through 14] fails to make even one reference to either Appendix B or C.

III. Conclusion

Petitioner, David L. Smith, requests that this Court not allow International Biochemicals Group, Inc. to file its proposed *amicus curiae* Brief opposing petitioner's application for Writ of Certiorari except as noted.

David L. Smith 5/23/97

DAVID L. SMITH, Petitioner
In Proper Person
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c/o Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

May 23, 1997

Clerk of Court
U.S. Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

re: No. 96-1655 David L. Smith vs. John Elkins, Benefits Systems, Inc. Microbe Masters, Inc.

Gentlemen or Ladies:

Enclosed is original and 11 copies of my Opposition to Motion for Leave to file brief of *amicus curiae* in Oppostion to the petitioner for writ of certiorari and in support of respondent, Microbe Masters, Inc.

Also enclosed is original and 1 copy of my affidavit of service of this Opposition to counsel of record.

Please file as appropriate. Any copies in excess of your requirements please stamp and return in enclosed self addressed stamped envelope.

I may be reach 504/291-8003 if any questions.

Yours very truly,

David L. Smith

enclosures

RECEIVED
MAY 27 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.